S. Hrg. 101-247, Pt. 4B

REPORT OF THE SENATE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE WALTER L. NIXON, JR.

HEARINGS

BEFORE THE

SENATE IMPEACHMENT TRIAL COMMITTEE

UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

THE ARTICLES OF IMPEACHMENT AGAINST JUDGE WALTER L. NIXON, JR., A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, FOR HIGH CRIMES AND MISDEMEANORS

PRIOR RECORD ADMITTED INTO EVIDENCE:
HOUSE OF REPRESENTATIVES IMPEACHMENT INQUIRY

Part 4B of 4 Parts
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PARTS AND VOLUMES
OF THE
EVIDENTIARY HEARINGS RECORD

PART 1
Pretrial Matters

PART 2
Evidentiary Hearings, September 7 through September 13, 1989

PART 3
Exhibits Admitted into Evidence

PART 4A
[Volumes I and II]
Prior Record Admitted into Evidence:
U.S.A. v. *Walter Nixon, Jr.*
Criminal Action No. H85-00012 (L)

PART 4B
[Volumes I, II, and III]
Prior Record Admitted into Evidence:
House of Representatives Impeachment Inquiry

PART 4C
Prior Record Admitted into Evidence:
Walter L. Nixon, Jr. v. *U.S.A.*
No. H88-0052 (G)
(Post-Conviction Proceeding)

JUDGE WALTER L. NIXON, JR., IMPEACHMENT INQUIRY

HEARING

BEFORE THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

H. RES. 87, IMPEACHING WALTER L. NIXON, JR., OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, FOR HIGH CRIMES AND MISDEMEANORS

MARCH 2, 1989

Serial No. 3

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CONTENTS

HEARING DATE

Page

March 2, 1989 1

WITNESSES

Kaufman, Andrew, professor of law, Harvard Law School 35
Keith, Peter, assistant special counsel to the House Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights 2
Lubet, Steven, professor of law, Northwestern University, Chicago, IL 10
Steward, David, Esq 53

APPENDIX

HEARING EXHIBITS

1. Chronology of Nixon-Fairchild relationship 67
2. Affidavit of Judge Nixon 71
3. Records from *Boam Co., et al.* v. *Dependable Insurance Co., et al* 73
    (a) Letter dated May 23, 1979 133
    (b) Order dated August 8, 1979 150
    (c) Settlement agreement dated August 29, 1979 159
4. Records from *Seymour* v. *L&A Contracting Co., et al* 174
    (a) Order dated June 16, 1980 297
    (b) Motion for summary judgment dated July 17, 1980 325
    (c) Order dated December 4, 1980 340
    (d) Scheduling sheet dated May 5, 1982 356
5. Affidavit of James Carroll 378
6. Affidavits (3) of George Morse 381
7. Affidavits (2) of Joe Sam Owen 389
8. Affidavit of Judge Russell 396
9. Affidavits from counsel in *Boam* 398
10. 28 U.S.C., section 455 410
11. Code of Judicial Conduct 412
12. Letter of August 6, 1985, from David Stewart to Alan Baron with attached Nixon loan records 421
13. Original 1981 Nixon financial disclosure statement, amended statement and letter from Judge Tamm to Nixon, June 18, 1982 476
14. Bank statements, Nixon's First Mississippi National account No. 658-364-5 for period December 31, 1981 to March 31, 1982 483
15. Letter from Fairchild to Keith, January 24, 1989, with attached summaries 491
16. Letter from Keith to Professor Lubet, February 21, 1989 505
17. Curriculum vitae of Professor Lubet 513
18. Letter from Keith to Professor Kaufman, February 21, 1989 522
19. Deposition of Magistrate Roper 530
20. Caseload data 607
21. Records from *Transcontinental Gas Pipe Line Corp.* v. *Mississippi State Oil and Gas Board, et al* 626
Supplemental materials submitted by Judge Walter L. Nixon, Jr 651

CONTENTS

[illegible]

OPINIONS

[illegible]

APPENDIX

[illegible]

[illegible]

JUDGE WALTER L. NIXON, JR., IMPEACHMENT INQUIRY

THURSDAY, MARCH 2, 1989

House of Representatives,
Subcommittee on Civil and Constitutional Rights,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:34 a.m., in room 2226, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Don Edwards, Geo. W. Crockett, Jr., F. James Sensenbrenner, Jr., and Craig T. James.

Also Present: Catherine LeRoy, counsel; Dorothy Wadley, clerk; Alan I. Baron, special counsel; Peter Keith, assistant special counsel; and Pamela Naughton, assistant special counsel.

Mr. **Edwards**. The subcommittee will come to order.

Today the subcommittee continues its inquiry into whether there are sufficient grounds to impeach Walter L. Nixon, Jr.

I yield to the gentleman from Wisconsin, Mr. Sensenbrenner.

Mr. **Sensenbrenner**. Mr. Chairman, I ask unanimous consent to carry over and incorporate by reference into the record of this hearing all evidence, documents, materials, and testimony on the matter of the impeachment inquiry against Federal District Judge Walter L. Nixon, Jr., taken during the 100th Congress and to include all such materials in the record of the 101st Congress.

Mr. **Edwards**. Without objection, so ordered.

Following the conclusion of our hearings last summer, our investigation continued. As a result of that investigation, we learned that Judge Nixon had presided over two civil cases involving W.R. Fairchild Construction Co. at the same time that he was negotiating and profiting from his oil and gas investment with Fairchild. In both cases, Judge Nixon issued rulings affecting Fairchild without recusing himself or disclosing his financial relationship with Fairchild to the parties.

The facts—these facts did not emerge during the Department of Justice investigation of Judge Nixon, nor were we aware of them during our deliberations last summer. Indeed, counsel for Judge Nixon noted that there was no evidence that Judge Nixon handled matters in Federal court involving Wiley Fairchild.

So these newly revealed facts are the subject of the hearing today.

Our procedure today will be as follows: First, Assistant Special Counsel Peter Keith will summarize the two cases and the testimony last summer concerning the Nixon-Fairchild oil investment, so that we can understand the chronology of events as a framework for the testimony to follow. And after that, we are going to hear from two experts in the field of judicial ethics.

Mr. Keith.

Mr. **Keith**. Thank you, Mr. Chairman.

[Mr. Peter Keith sworn by the chairman.]

STATEMENT OF PETER KEITH, ASSISTANT SPECIAL COUNSEL TO THE HOUSE JUDICIARY COMMITTEE, SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

Mr. **Keith**. Mr. Chairman, at your direction, what I will try to do briefly for the next 10 or 15 minutes is give an impartial summary of the key facts, both summarizing the testimony last summer dealing with the Nixon-Fairchild oil and gas investment and then also to summarize the events in the two civil cases that were handled by Judge Nixon.

Perhaps the easiest way to proceed would be to turn to exhibit 1 in the binder of exhibits, which have been distributed to the members and also provided to Judge Nixon and his counsel. And what that exhibit is, is a chronology of the relationship between Judge Nixon and Wiley Fairchild. On the lefthand side of the chronology are the events, the developments in the financial relationship between the two men, and to the right is the progress of the two civil cases.

Because there is an issue of credibility in this case in disputes about the credibility of the various witnesses, what we have done on the lefthand side of the chronology is simply summarize Judge Nixon's own testimony. Those paragraphs there are simply the product of his own testimony during the hearings last summer as to when the various developments in the oil and gas deal took place.

And just to briefly summarize what's on the lefthand side of that chronology, Judge Nixon testified that it was in February 1979 that he and Carroll Ingram first discussed the possibility of an investment between the judge and Wiley Fairchild. Judge Nixon testified that at that point in time he already knew that Mr. Fairchild was in the construction business, and that after that meeting with Carroll Ingram, he proceeded to check on Mr. Fairchild's reputation.

There was conflicting testimony on who brought up the name, Fairchild, first. Judge Nixon testified that it was his recollection that Carroll Ingram had done so. Mr. Ingram recalled that it was Judge Nixon who first mentioned Wiley Fairchild. But in any event, Judge Nixon did note that the investment was his idea and not Carroll Ingram's.

Then in the spring of 1979, according to Judge Nixon, he got back with Carroll Ingram, told him he was interested in making a good investment with Wiley Fairchild, and told Ingram that he could spend approximately $10,000.

After that conversation with Ingram, he contacted Ingram several times to try to follow up on the deal, and then in the summer of 1979, learned from Carroll Ingram that Ingram had spoken with

Fairchild and that Fairchild would be delighted to put the judge in mineral interests.

Then Judge Nixon testified that it was in late 1979 when he had further conversations with Carroll Ingram. Carroll Ingram told him that he had talked with Fairchild and identified three specific wells that Fairchild was offering. Judge Nixon was told that the total cost would be $9,500, and he was also told that, in terms of concluding the transaction, that Mr. Fairchild was a man who could not be pushed and would take his own sweet time in concluding the deal.

Judge Nixon testified that he relied on the recommendations of Mr. Fairchild and Mr. Ingram in concluding the transaction, that there were no negotiations on the terms of the investment, and that Mr. Fairchild even had the right to select and even substitute the various wells if he so desired.

Now according to Judge Nixon, it was in late February or early March 1980 when he, for the first time, met Wiley Fairchild, and that was at the offices of Fairchild Construction Co. in Hattiesburg. The judge testified that after that meeting with Fairchild, he was under the belief that he definitely had an agreement to go forward with the investment. The judge stated in his hearing testimony that he knew the opportunity was not available to the general public, but believed that Mr. Fairchild wanted to invest with him, because Fairchild had heard of Judge Nixon, wanted to meet him, that Carroll Ingram had recommended the judge, and that Fairchild believed that Judge Nixon was a person of good reputation.

Judge Nixon also noted that during that first meeting, Mr. Fairchild called him judge, rather than by his first name.

Now according to Judge Nixon, during the next year, from February 1980 until late February or late March 1981, he placed several calls to Wiley Fairchild to talk about the investment and just generally keep in touch with Mr. Fairchild. He indicated there were several calls, probably not more than 10 telephone conversations during that year.

Then in late February or early March 1981, Judge Nixon received deeds from Carroll Ingram to conclude the documentation of the transaction. The deeds were from Fairchild Construction Co. transferring royalty interests in the three wells, and as part of the transaction, Judge Nixon borrowed $9,500 again from Fairchild Construction Co. He executed promissory notes. The notes were to be repaid by February 1983, and they were at an interest rate of 10 percent. I would note that we have collected documents from—voluntarily produced by Judge Nixon's counsel. That appears in exhibit 12 of the binder, and those reflected at the same time Judge Nixon was concluding the Fairchild transaction and executing the promissory notes at 10 percent interest, that he was also borrowing from banks on other oil investments at much higher interest rates, 15 percent, at the same time, which was then the market rate offered by the banks.

Judge Nixon testified that in May 1981, he again met with Fairchild at the construction company's office. The investments were discussed, and that was the meeting when Judge Nixon told Mr. Fairchild, "If there's ever—if I can ever help you, I will, and if I can't, I'll tell you I can't."

The next development would be in February 1982 when the first royalty check was issued. The check was issued by Fairchild Construction Co. payable to Judge Nixon.

And then turning to the last page of the chronology, on March 16, 1982, by that point in time Judge Nixon had received approximately $7,500 in royalty payments from Fairchild as part of his investment, and that was the date on which he made the first payment back to Fairchild Construction on the notes. He issued three checks made payable to Fairchild Construction, totally in $5,000. The notes were not due until February 1983, and in his testimony last summer, when he was asked why he repaid the notes prior to the time they were actually due, he indicated that he did so to save on the interest.

Based upon the records that we have uncovered since the recess over the summer, which have been voluntarily provided by Judge Nixon and his counsel, we have confirmed that at that period of time when he was prepaying the notes, that Judge Nixon was borrowing money in similar sums of approximately $10,000 at 15 and as high as 18 percent interest rates.

We have noted on the chronology the May 14, 1982, date, which was the subject of the hearing last summer. That is the date on which Bud Holmes believes that the meeting at the farm with Judge Nixon may have occurred.

And by the middle of May 1982, Judge Nixon had received approximately $9,500 in royalty payments out of his investment with Wiley Fairchild.

Now turning back to the start of the chronology, just to summarize briefly the two civil cases that are at issue today, the first case is called *Boam* v. *Dependable Insurance Co.*, and that is a case involving the construction and renovation of pump stations on the sewage system in Gulfport, MS. There are many different parties in the case, including the prime contractor on the project, the city of Gulfport, a bonding company, various subcontractors, and suppliers.

One of the subcontractors in the case was Fairchild Construction Co., and in September—excuse me—in August of 1978, Fairchild Construction Co. moved to intervene as a party in the case, seeking $18,600 in damages. That particular motion was handled by Magistrate Roper, and Magistrate Roper provided us with a deposition, which is part of the exhibit book—it's exhibit 19, I believe—and he indicated that in his role as a magistrate in the regular course of business in the Southern District of Mississippi, that he was called upon in civil cases to handle nondispositive pretrial motions. That was the reason why he was handling that particular proceeding, and in September 1978, he granted intervention by Fairchild, so that Fairchild Construction Co. became a party in the case at that point in time.

It appears from the pleadings in the case and the orders entered by Judge Nixon that in February 1979, about the time that he was first discussing the investment with Ingram, is the first time at which the Judge has any substantive involvement in the case, and that was on February 13, 1979, at which he entered certain judgments, default judgments, on motions by other parties.

Judge Nixon had further involvement in the case in May 1979 when he heard motions. The hearing was held—again, it involved other parties besides Fairchild, other claims besides the one that Fairchild Construction Co. had filed.

Now if you will take a look at exhibit 3, which is the collection of the pleadings from the *Boam* case, and turn to tab A, you will see the first motion in the case which involves Fairchild Construction Co. What you see there at tab A is cover letter filed by the attorney for Dependable Insurance Co., and Dependable was moving for summary judgment against all of the intervening subcontractors, including W.R. Fairchild Construction Co., as you can see from the letter. The cover letter was also sent to Judge Nixon, and attached with the letter were pleadings again moving for summary judgment against Fairchild Construction Co.

Now in June, on June 5, 1979, a hearing was held before Judge Nixon. The hearing, according to the deputy clerk's sheet that summarizes the hearing, lasted only 10 minutes. Counsel for Fairchild was present at that hearing, and at that hearing, Judge Nixon indicated that the case would be referred to Magistrate Roper. However, after that hearing, Judge Nixon continued to handle certain motions in the case. He rendered orders in the case on June 8, 13, and 19, 1979. All of those orders involved parties other than Fairchild Construction.

On July 9, 1979, Judge Nixon entered a formal order of reference to Magistrate Roper. This was an order passing the case to the magistrate. It was consented to by four of the parties, but Fairchild's counsel did not sign onto that order of reference. The order did note that, as district judge, Judge Nixon would enter judgment if appropriate upon review of the proceedings.

And when we asked Magistrate Roper about that in his deposition, he indicated that at that point in time there was some constitutional and statutory question about the power of magistrates to enter final judgments, even in cases where the parties had consented to the magistrate trying the case and entering the judgment, so that in the exercise of caution, it was his practice and the practice of the district judges in the Southern District of Mississippi to have the presiding district judge enter any judgments and sign any concluding documents in the case.

Now if you will turn to tab B, as part of exhibit 3, you will see an order entered by Judge Nixon on the 8th of August 1979, and this is the order denying the summary judgment motion filed by Dependable against Fairchild Construction Co. As a result of that order, Fairchild remained in the case with the opportunity to recover on its claim. I would note that similar orders were entered by Judge Nixon, as you can see from the following two pages. The language is virtually identical with regard to some of the other subcontractors.

There is no record from the pleadings in the case that there was ever any hearing held in connection with this order on behalf of Fairchild, nor was there any indication that there was any opposition filed by either Fairchild or any of the other subcontractors to that order.

Now shortly after Judge Nixon entered the summary judgment order and the others dealing with the subcontractors, the trial began before Magistrate Roper. The magistrate decided that he would divide the trial up, and he first decided to try certain claims that didn't involve Fairchild. Those claims were resolved after trial. A judgment was entered. Judge Nixon signed on the judgment. And at about the same time, the other parties reached an out-of-court settlement in the case.

If you turn to tab C, which is a part of the exhibits, that is a compilation of the settlement documents in the case. The settlement agreement was signed on August 29, 1979, and approved by Judge Nixon on September 6. Fairchild is identified as a party settling in the case, and as part of the settlement, Fairchild received a payment of $17,000, $17 out of the $18,600 that it had initially claimed in the case. At the end of the settlement agreement, you'll see that Judge Nixon signed approval of the agreement on September 6, 1979. Thereafter, Judge Nixon and Magistrate Roper entered a disbursement order approving the disbursement of the settlement funds. Judge Nixon approved that on October 12, 1979, and then on January 30, 1980, Judge Nixon and Magistrate Roper filed the final order dismissing Fairchild from the case with prejudice because of the settlement in the case.

Now there's no record at all in the case files of the Boam case that Judge Nixon ever recused himself or disclosed his negotiations with Wiley Fairchild that were ongoing at the time to the parties in the case. We asked that question to Magistrate Roper. He was not aware of that financial relationship. And we've also collected various affidavits and correspondence from counsel in the case in which they confirm that, in fact, there was no recusal or disclosure by Judge Nixon.

Magistrate Roper indicated that he supervised the final settlement of the case, and in terms of the involvement of Judge Nixon in executing these final papers, he indicated that in cases like this, that the district judges usually relied on his recommendations, because he was an experienced magistrate, and that the judges did not necessarily review the papers carefully before they signed them once the case had been resolved.

I would also point out that among the letters from counsel in the case is a letter from one of the attorneys, a Leonard Blackwell, an attorney who practices in Gulfport. Mr. Blackwell indicated that he felt that justice had not been compromised in the case, and that he been aware of the relationship, had Judge Nixon disclosed it, that he might well have agreed to let Judge Nixon continue to handle the case.

Now the second case involves an individual by the name of Jack Seymour, who was an employee of L&A Construction Co.—L&A Contracting Co., excuse me. Mr. Seymour was working on a barge during the demolition of a bridge, and he was graphically injured when a piece of concrete collapsed on him, in his midsection, and he suffered severe personal injuries.

The Seymour case was filed in the Southern District of Mississippi in February 1980. Fairchild Construction Co. was named as a defendant because they were involved in the project, and Fairchild was the second of five named defendants. Mr. Seymour claimed $6 million in damages arising out of his injury in the bridge construction.

With regard to Fairchild's involvement in this particular project, apparently Fairchild Construction was involved in driving the pilings on the new bridge. They had also entered into a joint venture with L&A, the first named defendant and Mr. Seymour's employer, to bond the project and to construct the new bridge.

The case was initially assigned to Judge Dan Russell, who was chief judge at the time. Judge Russell had standing orders that whenever the firm of White & Morse was involved in a case that he was to be recused from the case, because his nephew was a lawyer with that law firm, and White & Morse was indeed involved in the case. They were counsel for Fairchild Construction in the case, so that the case in March 1980 was reassigned to Judge Nixon from Judge Russell.

At approximately the same time, there was a second action filed, which was related to the *Seymour* case. Under maritime law, you're allowed, as a defendant, to file what's called an exoneration or limitation action. Three of the five defendants did file that proceeding. Fairchild was not a named party in that second action, but Fairchild Construction was identified in the pleadings as a party whose interests might be affected by the case. The limitation action was originally assigned to Judge Cox. It was then reassigned to Judge Russell, presumably because Judge Russell had already been assigned the *Seymour* case, and then the second case was, in turn, reassigned to Judge Nixon and consolidated with the first *Seymour* case, so that by May of 1980, Judge Nixon is handling both the initial Seymour personal injury case and the limitation action that was filed after that.

Now in addition to Seymour's claims for personal injury against Fairchild Construction Co., there were also cross-claims between the defendants for contribution and indemnity, and one of these cross-claims was by one of the defendants, Brown Engineers, that had worked on the project, against Fairchild for contribution and indemnity, based upon the joint venture agreement that Fairchild had with L&A Contracting. What Brown was essentially arguing was that in the event that a judgment was entered against Brown in the case, that Fairchild should contribute to that judgment because of the joint venture agreement.

Now unlike the *Boam* case that has multiple parties and oftentimes pleadings in which Fairchild Construction Co.'s name does not appear, in the *Seymour* case, Fairchild Construction's name appears on virtually every pleading, even when the motions deal with other parties.

And if you will turn to exhibit 4, which is the collection of the pleadings in the *Seymour* case and look at tab A, you'll see that as an example of an order entered by Judge Nixon, in this case on the 16th of June 1980, dealing with other parties, allowing counsel for one of the defendants, Moody Brothers, allowing its attorney to withdraw as counsel, but the way the parties captioned the case, you'll see that Fairchild Construction Co. is a named defendant in the case, and in this case, because it was a consent order, the order was signed by the attorney for Fairchild Construction Co.

During the summer of 1980, there was discovery conducted in this case. Interrogatories were filed between the parties. The interrogatories were answered. There was production of documents, requests for admissions, answers to admissions. Some of those answers and discovery requests were filed by Fairchild as well as the other parties.

Judge Nixon entered a second consent order in the case in July 1980 allowing Mr. Seymour to amend his complaint to change the nature of his claims in July 1980.

Now as in the *Boam* case, a summary judgment motion was filed before Judge Nixon involving Fairchild, and this appears at tab B of exhibit 4. This was a motion filed by Fairchild Construction Co. to have the claims brought by Mr. Seymour against it resolved by the judge prior to trial through summary judgment.

We've talked with counsel in the case, and it appears what happened was that it was during discovery over the summer, counsel for Fairchild concluded that there was no factual involvement by his client in the case, and apparently Mr. Seymour's counsel agreed that based upon the testimony in depositions and based upon what had happened in construction of the bridge, that Fairchild Construction Co. had not had an active part in the negligence that resulted in Mr. Seymour's injuries.

According to Mr. Morse's affidavit, which was submitted to us by Judge Nixon, Mr. Morse recalls a conversation with Judge Nixon in which he indicated that the motion would be unopposed and that Judge Nixon advised him to prepare concluding papers that would resolve this issue, including findings of fact and conclusions of law. And if you turn through tab B, you'll discover not only the motion itself filed by Fairchild Construction Co., but also a judgment entered by Judge Nixon granting the motion and dismissing the claims of Seymour against Fairchild Construction. That order was entered by Judge Nixon on September 3, 1980, and signed by him.

And then after the actual order, you'll see findings of fact and conclusions of law that were signed by Judge Nixon on the same date. .

So at that point in the case, Fairchild Construction Co. had no concern about the initial claim of Seymour against it, but it was still in the case as a codefendant with potential liability for contribution and indemnity in the event that judgment was entered against Brown Engineers.

As a result of that cross-claim, Fairchild Construction Co. tried to get out of the case entirely, again through summary judgment, and if you will turn to tab C, you'll see an order entered by Judge Nixon on December 4, 1980, overruling the motion of Fairchild Construction Co. for summary judgment on the cross-claim.

If you look two pages before tab C, you'll see a deputy clerk sheet that describes the hearing before Judge Nixon that took place with regard to argument of this particular motion. The motion, along with one other motion, was argued in a 30-minute hearing before Judge Nixon on November 26, 1980, and Judge Nixon indicated after argument that he was going to deny that motion, and, in fact, he did so, and you can see at tab C the order that he entered denied Fairchild's motion at that time.

So at that point in time, after Judge Nixon's second summary judgment motion ruling, Fairchild Construction was still in the case based upon the cross-claim of Brown Engineers.

After that motions practice in the summer and fall of 1980, there's a period of quiet in the *Seymour* case, and the next development doesn't take place until April 1982, and if you'll turn to tab D, you'll see a deputy clerk sheet describing a pretrial conference that was held before Judge Nixon on April 16, 1982. The sheet indicates that Judge Nixon presided over a 30-minute pretrial conference. Counsel for Fairchild was present, and at that conference, Judge Nixon advised the parties of how he was going to try the case, namely that the limitation and exoneration issues would be heard first, and he also directed the parties to explore possible settlement of the case.

According to counsel in the case, without further participation by Judge Nixon, the case was actually settled about a month after this pretrial conference, and you can see after the deputy clerk sheet there at tab D, the settlement papers in this particular case.

Judge Nixon approved the settlement and signed off on it. The case was settled for $665,000. Fairchild Construction Co. did not pay anything in the settlement and was released from all potential liability. However, one-quarter of the settlement was funded by an insurance carrier that had an insurance policy on the joint venture between L&A Contracting and Fairchild Construction Co., and counsel for Fairchild Construction Co. has provided us with an affidavit explaining why the insurance carrier was willing to contribute that sum. That's because they were afraid since L&A was the principal defendant, that there might well be a judgment in excess or up to the policy limit in the case, and that they were willing, because of the severity of Mr. Seymour's injuries, to contribute that much money.

Again, neither the records in the case nor the recollections of counsel ever recall any recusal by Judge Nixon in the *Seymour* case or any disclosure of his relationship with Mr. Fairchild, and again, we've obtained affidavits from the counsel in the case confirming that fact.

I would point out that Mr. Carroll, who represented L&A Contracting, is of the opinion that Judge Nixon should have recused himself or disclosed his participation in the case. Mr. Morse, who represented Mr. Fairchild, believes that Judge Nixon should have disclosed his relationship with Fairchild at that point in time.

The attorneys also say, however, that there was no favoritism shown by Judge Nixon in his actual handling of the case when he was presiding over it.

So in summary, we have two cases here in which Judge Nixon presided over cases involving Fairchild Construction Co. One takes place at the time that he is negotiating his oil and gas investment with Fairchild. That case is settled before there's a firm agreement.

The second case arises after a verbal agreement and continues during the period of time in which further negotiations take place and in which the documents are prepared in which Judge Nixon borrows the money from Fairchild Construction Co. and in which he's actually receiving royalty payments, and the record shows no recusal or disclosure by Judge Nixon in either of those two cases.

Thank you, Mr. Chairman.

Mr. Edwards. The Chair notes with pleasure the presence of two new members of the subcommittee, the gentleman from Michigan, Mr. Crockett, on my left, and the gentleman from Florida, Mr. James. We welcome you both.

Next we will hear testimony from two experts in the field of judicial ethics. Prof. Steven Lubet of Northwestern University of Law and Prof. Andrew Kaufman of Harvard Law School will analyze Judge Nixon's handling of the cases, given the requirements of the Code of Judicial Conduct and the judicial disqualification statute.

We welcome these gentlemen to Washington and thank them for their interest in our inquiry.

Mr. Stewart will be granted full opportunity to cross-examine these witnesses in the same manner as took place during the hearings last summer. The two witnesses will testify separately.

Prof. Steven Lubet of the Northwestern University School of Law will testify first.

[Witness sworn.]

Mr. **EDWARDS**. We will proceed.

Associate Counsel Pam Naughton to question.

Ms. **NAUGHTON**. Prof. Lubet, could you state your occupation and where you teach, please?

STATEMENT OF STEVEN LUBET, PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY, CHICAGO, IL

Mr. **LUBET**. Yes. I am a professor of law at Northwestern University in Chicago, IL.

Ms. **NAUGHTON**. And what subjects do you teach?

Mr. **LUBET**. I teach legal ethics, a variety of litigation-centered courses, criminal process, from time to time seminars in other unrelated area.

Ms. **NAUGHTON**. Could you tell us about your educational background?

Mr. **LUBET**. I have a bachelor's degree from Northwestern University in Evanston, juris doctor from the University of California at Berkeley.

Ms. **NAUGHTON**. And have you testified before Congress before?

Mr. **LUBET**. I have testified before Congress three times previously; twice before the House Judiciary Committee Subcommittee on Crimes, both times dealing with extradition reform legislation that was proposed but never enacted, and once before the Senate Foreign Relations—Affairs—you tell me—the Senate Foreign Affairs Committee dealing with a proposed extradition statute with the United Kingdom and that was ratified.

Ms. **NAUGHTON**. Specifically, in the area of judicial ethics, could you give an idea of your publications and research in that field?

Mr. **LUBET**. Judicial ethics is my primary academic interest, and I have published, I suppose, half a dozen or more law review articles in the area of judicial ethics. I am currently at work on a treatise that will cover the subject, I hope, fully, and with luck, it will be published sometime next year. It is the area in which I am constantly involved.

Ms. **NAUGHTON**. And have you served as an advisor to any particular judicial groups or judges?

Mr. **LUBET**. Yes. I am—how shall I say this—on the circuit, I suppose, in continuing judicial education, and I imagine that I teach or lecture on the subject of judicial ethics to various judges' organizations five or six times a year. Typically, it would, perhaps, be the State judges' organization. I have done that in Illinois, Georgia, Wisconsin, Maryland, Utah, probably 8 or 10 States, or various other organizations of judges. In addition, from time to time, I counsel individual judges regarding their ethical responsibilities. I suppose you would say that is on an ad hoc basis. I have been an advisor to the State of Wisconsin in redrafting their judicial code and probably two or three dozen other involvements like that.

Ms. NAUGHTON. Thank you. Now, the staff of this committee sent you some materials a while back to study regarding your testimony today. Could you tell us, briefly, outline exactly what it is that you studied in preparation for your testimony today?

Mr. LUBET. Surely. I received a letter, actually several letters, from Mr. Keith. One of them involved the chronology that he just read. The later one involved a listing of facts that I could assume for the purposes of testifying here today. I also received the pleadings in the two cases, the *Seymour* and *Boam* case that Mr. Keith referred to, and I read through those pleadings; a variety of other documents, including the mineral deeds that Judge Nixon had received from Fairchild; the previous fifth circuit opinion regarding Judge Nixon; also, the memorandum that Mr. Stewart prepared and submitted to the committee and also an opinion letter from Prof. Hazard.

Ms. NAUGHTON. And did you then undertake your own research regarding some of these questions that were posed by the committee?

Mr. LUBET. Yes, I did.

Ms. NAUGHTON. And could you give us some idea of the total time spent on this project for us?

Mr. LUBET. I would say 12 to 15 hours, exclusive of flight time.

Ms. NAUGHTON. OK. Thank you. Now, if you could give us a little background, Professor Lubet, on the statutory law involved as well as the Code of Judicial Conduct, and let us start first with statutory law. That is, title 28 United States Code, sections 455, which governs situations wherein recusal might be warranted. For the committee's benefit, that is exhibit 10 in the exhibit book. Could you give the committee an idea of the purpose of that statute and its history?

Mr. LUBET. Briefly, section 455 was amended in the early 1970's principally, I believe, in order to tighten the standards for disqualification or recusal by Federal judges. Previous to the amendment of section 455, judges were required to step aside on everyone agreed what a subjective standard. That is, the judge only needed to step aside if the judge himself or herself believed that the judge could not be fair, and parties had—there was very, very little in the way of an objective standard. Four 45 was amended to rectify that situation and provide objective grounds for judicial disqualification and also, I think, stricter grounds for judicial disqualification. This followed very closely the adoption by the U.S. Judicial Conference of the model Code of Judicial Conduct which contained very strict mandatory provisions for disqualification, and in many ways, you would say that 455 is the codification of the recusal sections, canon 3C of the Code of Judicial Conduct.

I would add, previous to the amendment of 455, it was widely understood, and indeed, Justice Rehnquist included in a separate opinion that he wrote, it was widely understood that judges had a duty to sit. That is, the judges should not step aside in a case unless they really, really had to, and that doubts should be resolved in favor of sitting in the case and against stepping aside. The new 455 and the Code of Judicial Conduct reversed that presumption. They were intended to reverse that presumption, and following the amendments, the new presumption is that judges should step aside. They should err in favor of disqualification and should step aside, as 455 says, in any case in which the judges impartiality might reasonably be questioned.

Ms. **Naughton**. Is it the judge's responsibility to be aware of his financial obligations and whether or not it comes in conflict with any case before him?

Mr. **Lubet**. Yes. Under both the statute and the Code of Judicial Conduct, there are specific provisions that require judges to be aware of their financial holdings. Those provisions are found within the disqualification sections, and it is obviously implicit that the purpose of being aware of one's financial holdings are in order to step aside in cases where the judge is financially involved.

Ms. **Naughton**. Is this a responsibility that the judge could delegate to a clerk or to a law clerk?

Mr. **Lubet**. No, I do not believe so. The responsibility is personal to the judge.

Ms. **Naughton**. Now, particularly in terms of the statute and in terms of financial responsibilities of the judge, what specific instances are governed by section 455? That is, what instances dictate recusal?

Mr. **Lubet**. Well, 455 is divided into two parts. The first part, subsection A, requires a judge to step aside in any case where impartiality might reasonably be questioned, and this can cover a wide variety of financial relationships, although none of them are specified in part A. Part B goes on to specific a nonexhaustive set of financial circumstances that will also require a judge to step aside. If the judge has any financial interest, however small, that is the language of the statute and the code, in a party or in the subject matter of the proceeding, the judge is required to be disqualified. Beyond that, if the judge has any other interest, financial or otherwise, although, typically, it would be financial, that could be substantially affected by the outcome of the proceeding, the judge is also required to step aside.

Ms. **Naughton**. Now, what is the remedy in the statute if the statute was violated; that is, if a judge should have recused himself and did not?

Mr. **Lubet**. The statute contains no remedy within it. Obviously, under some circumstances, if a judge is supposed to step aside and does not, the parties may appeal.

Ms. **Naughton**. OK. And have reversals come about on the basis of failure to recuse?

Mr. **Lubet**. Certainly.

Ms. **Naughton**. Now, moving to the Code of Judicial Conduct, if we can, you mentioned earlier that the code tracks language in 455.

Mr. LUBET. Well, actually, 455 tracks the language of the code.

Ms. NAUGHTON. Do you recall when the code was adopted?

Mr. LUBET. The code was adopted by the American Bar Association in 1969. It was adopted by the Judicial Conference of the United States several years later, I think 1972.

Ms. NAUGHTON. So, the code applied to the conduct of Federal judges.

Mr. LUBET. Yes. Actually, by statute, the Judicial Conference was created by statute and was empowered to adopt disciplinary proceedings or to pursue disciplinary proceedings regarding Federal judges, short of impeachment, of course, and within the enabling legislation creating the Judicial Conference, that is specifically provided for, and I believe that the code was adopted by the Judicial Conference both as a statement of aspiration regarding the consensus of opinion among Federal judges as to what their behavior ought to be but also as part of their regulatory authority under the Judicial Disqualification and Disability Act.

Ms. NAUGHTON. Now, the standard of conduct, as laid out by the Code of Judicial Conduct is, I think we can agree, a rather high standard. Could you explain the differences in the standard that the code applies to judges as opposed to the standards of conduct for other public officials?

Mr. LUBET. I am sorry. Could repeat that, please?

Ms. NAUGHTON. Could you explain the differences in the higher standard of conduct that the code imposes on judges as opposed to other public officials?

Mr. LUBET. Yes. I am not sure I would call a higher standard of conduct, but maybe we should call it a stricter standard of conduct that the code imposes. Obviously, Federal judges occupy a very different position than do members of the executive or Members of Congress. Life tenure is a clear difference, but there are differences beyond that, too. For example, comparing the disqualification requirements, say, that apply to judges and Members of Congress, Members of Congress have constituents and are intended to act in a representative fashion on behalf of the constituents. That, obviously, suggests a level of active involvement that is not intended to be carried out by judges.

Judges are not intended to represent any particular group of people, any class of constituents. Judges are not in place in order to carry out the wishes of any particular group of people, and indeed, quite the opposite. Judges are expected and required to exercise impartial judgement irrespective of the wishes or the desires of any particular group, and so, the standards of impartiality and conduct are necessarily more strict for a judge than for a member of any other branch of government. There is another distinction, too, and that is judges, particularly Federal district court judges, act individually regarding specific disputes involving identifiable individual citizens. No member of Congress does that. Members of Congress, for example, act only in concert with each other and, typically, are not resolving acute separate disputes.

Ms. NAUGHTON. Now, if we could direct your attention to the code itself, and for the Members' information, it is exhibit 11 in the exhibit books, and go through the canons that may be applicable to the facts that Mr. Keith laid out earlier this morning. Starting with canon 1, could you explain to the Members what canon 1 imposes on judges?

Mr. **Lubet**. Well, it is not clear that canon 1 imposes anything on judges. Canon 1 requires that judges, at all times, uphold the integrity and impartiality of the judiciary. It is, by and large, a preamble and, to my knowledge, has not widely, if at all, ever, been invoked as a separate basis for judicial discipline.

Ms. **Naughton**. OK, but is it fair to say canon 1 states that the judge must conduct himself so as to preserve the integrity of the judiciary?

Mr. **Lubet**. Yes. That is an aspirational standard that is intended to apply to judges in all aspects of their performance on the bench and their personal lives to exemplify the integrity and independence of the judiciary and to conduct themselves at all times in a way that does not threaten the integrity or independence, and I think those are equally important, integrity and independence of the judiciary.

Ms. **Naughton**. Directing your attention to canon 2, can you explain to the membership what canon 2 describes?

Mr. **Lubet**. Yes. Canon 2 requires that judges avoid all impropriety and the appearance—all appearance of impropriety; to follow the law, which is both an impropriety and, I suppose, would come under the appearance of impropriety. That means not follow the law in their judging, in the manner in which they judge others, but follow the law in their own lives, in their individual lives. It's got a variety of other clauses. A judge should not lend the prestige of office to the private interests of another person, should not allow family or social relationships to influence judgment, should not give the impression that others are in a special position to influence the judge's judgment or in any other manner create the appearance of partiality or impropriety.

Ms. **Naughton**. OK, thank you. And directing your attention to canon 3, could you tell us what canon 3, particularly canon 3C, requires regarding disqualification?

Mr. **Lubet**. Surely. Canon 3 is the on-the-bench conduct canon. It's the canon that governs how judges comport themselves in their official capacity. It's got three parts.

Part A deals with adjudicative responsibilities. Part B, canon 3B, deals with administrative responsibilities, and then canon 3C, which is the one you've inquired about, Counsel, deals with disqualification, the circumstances under which a judge who is subject to the code is required to disqualify himself or herself, and by and large, canon 3C is identical with section 455 of title XXVIII. There are some languages differences, but the requirements are principally the same.

Ms. **Naughton**. And turning your attention to, then, canon 5, again particularly canon 5C, could you tell us what canon 5 requires?

Mr. **Lubet**. Sure. Canon 5 is the part of the Code of Judicial Conduct that covers nonjudicial activities, activity away from the bench, personal conduct.

5A is, I think, avocational activities. 5B is civic and charitable activity, and then 5C is financial activity. Canon 5C sets out a rather specific set of mandatory rules that are intended to govern the financial activities of judges.

Ms. **Naughton**. And in general, starting with 5C, does it specify that a judge should refrain from business dealings that would reflect adversely on his impartiality?

Mr. **Lubet**. Yes. Canon 5C(1) contains a general statement that governs all of the judges' business and financial activities, and the general statement is that the judge should refrain from all business and financial activities that reflect adversely on impartiality, and then there are some other requirements, too, that interfere with the conduct of judicial business or that are undignified. But the principal one, obviously, is that judges are required to avoid any financial activity whatsoever that suggests partiality in the course of judging.

Then there's the no-business rule and a variety of other specific exclusions that judges must adhere to.

Ms. **Naughton**. Specifically, are there requirements regarding loans that judges accept?

Mr. **Lubet**. Yes. Loans are found in canon 5C(4), I think, subpart 4, is the portion of the code that deals with loans, and again there are three or four subparts there, and it's a very specific outline.

The principal rule is that judges "may"—that is, there's an affirmative provision there that says that judges may receive loans from lending institutions that are given on terms that are generally available from the public, lending institutions on terms that are generally available from the public, and then it goes on. The next subpart says that a judge may take any other loan—that is, a loan other than from a lending institution—only if it is not from a party, a lawyer, or any other person or concern whose interests have or may come before the judge.

So judges are affirmatively permitted to take loans from lending institutions. After that, judges may take other sorts of loans, personal loans or other sorts of loans, but only if it's not from a party in a case before the judge.

Ms. **Naughton**. Or an attorney practicing——

Mr. **Lubet**. Or an attorney practicing before the judge or any other person whose interests may come before the judge.

Ms. **Naughton**. Now that we've gone through the relevant parts of the statute and the code, I'd like to get your opinion in applying the Code of Judicial Conduct to Judge Nixon's actions, as were explained by Mr. Keith earlier this morning.

Mr. **Lubet**. Yes, ma'am.

Ms. **Naughton**. And if we could sort of start in a chronological fashion, regarding his activities in the spring of 1979—that is, in solicitation by him of Carroll Ingram and asking Mr. Ingram, an attorney who practiced before him, to put him into an investment with a client of Mr. Ingram's—that is, Mr. Fairchild—so that he might receive a profitable investment, what, in your opinion, given the Code of Conduct, is the propriety of such actions on the part of Judge Nixon?

Mr. **Lubet**. Well, we have to break that apart. As I understand it, Mr. Ingram was an attorney who practiced law before Judge Nixon?

Ms. **Naughton**. Yes.

Mr. LUBET. Judges are required to avoid business transactions with lawyers who appear before them. To the extent that this relationship involved Judge Nixon in a business transaction, not specifically with Mr. Ingram but using Mr. Ingram, I suppose, as a business advisor or for assistance in his own business activities, that would violate canon 5C, because it's a financial transaction with a lawyer who comes before him.

Continuing, then, if Judge Nixon was soliciting or engaged in a financial transaction or attempting to engage in a financial transaction with the Fairchild Co. while the Fairchild Co. was a part in a lawsuit before Judge Nixon, just that negotiation, without regard to the outcome, just the negotiation would also violate canon 5C.

Ms. NAUGHTON. Could you elaborate on that? In other words, at this particular time, we have heard that the *Boam* case was pending before Judge Nixon.

Mr. LUBET. Yes, ma'am.

Ms. NAUGHTON. The Fairchild Construction Co. was a party, and that is with whom the investment was made by Judge Nixon.

What is the particular law on that point, the solicitation of a business deal while a case is pending?

Mr. LUBET. Well, there are two or three points. One is that eventually the relationship between Judge Nixon and Fairchild Co., as I understand it, involved a loan. So the solicitation of a loan or the receipt of a loan from a party currently engaged in litigation before the judge would violate the very specific loan provision of canon 5C(4).

Also, however, the negotiation of any sort of business arrangement with a party who is—or a lawyer, for that matter, who is currently appearing before the judge violates canon 5C(1), because it reflects adversely on the judge's impartiality. There is the inescapable suggestion that a judge will not be impartial and certainly will not appear impartial, who is at one and the same time sitting in judgment of a party's case while seeking financial favors and arrangements, even if they're at arms length, from that very same party. The two relationship are not intended to occur simultaneously. Judging and finances have to be kept separate.

Ms. NAUGHTON. You mentioned the loan, if we could get to that specifically now. In your opinion, what was the propriety of Judge Nixon accepting a loan from W.R. Fairchild Construction Co. when it was a party before him in the *Seymour* case?

Mr. LUBET. There is an absolute prohibition on accepting loans from parties who are then before the judge. It is simply not allowed. So that violates canon 5C(4), I think is the subsection. The only exception to that is if the loan is taken from a lending institution, and if it's given on terms that are available to the general public.

The facts that have been presented to me are that the Fairchild Construction Co. is not a lending institution, nor were the terms of the loan generally available to the public. So it does not fall within that exception.

Ms. NAUGHTON. All right. When you say "the terms of the loan," Mr. Keith referred earlier that the judge had borrowed commercially a similar amount on a 90-day loan at 15 percent and had a line of credit on his checking account of 18 percent.

Are the interest payments part of what you were figuring into your——

Mr. **Lubet**. Terms would include interest payments, rate of interest, security, term of the loan, and things like that, incidents of default.

Ms. **Naughton**. Now if we can get to the investment itself, an analysis of canon 3, particularly canon 3C of the code, regarding the oil royalty investment itself, in your opinion, did Judge Nixon's conduct violate canon 3C(1)—that is, the canon which requires a judge to act so that he does not call into question his impartiality?

Mr. **Lubet**. Yes, it does. First, implicit in the financial dealings canon 5C that restricts judges from engaging in financial relationships with parties, the flip side of that, of course, is, if you are going to engage in a financial relationship with someone, then the judge must take steps to set aside the case, so that the individual or the company is no longer a party.

Continuing to engage in financial relationships with a party, then, would violate both canon 5C and canon 3C, since the judge has not stepped aside.

Ms. **Naughton**. And once again, canon 3C deals with disqualification?

Mr. **Lubet**. That's right. That's right.

Ms. **Naughton**. As to canon 3C(1)(a), which regards the appearance of possible bias or prejudice, how do you analyze the facts in relation to that particular canon?

Mr. **Lubet**. Canon 3C(1) requires that a judge not sit in any case where his impartiality might reasonably be questioned. Then the other subparts—A, B, C, et cetera—provide examples, nonlimiting examples of situations where a judge must step aside.

The first subpart, which is bias or prejudice regarding a party, is generally interpreted to mean personal bias or prejudice either for or against a specific party, something other than a financial relationship.

Based on the information that I have, I think that would not be implicated in this case. Other facts might lead one to conclude differently.

And as to canon 3C(1)(c) regarding financial—whether or not the judge has a financial interest in the affairs of a party, could you tell us how you analyzed that particular canon in regard to the facts before you?

Mr. **Lubet**. Yes. I think that continuing to sit in a case that involved the Fairchild Co., given the facts that have been presented to me, does violate canon 3C(1)(c). I think that Judge Nixon did have a financial interest in the affairs of the Fairchild Construction Co., so as to require him to step aside.

Ms. **Naughton**. Why do you think that? Why do you come to that conclusion?

Mr. **Lubet**. I think that for two reasons. The first is that, as I understand it, what Judge Nixon had received as a consequence of his loan and repayment agreement with the Fairchild Construction Co. were royalty rights regarding certain oil wells. A portion of those rights had been owned by the Fairchild Co. and then were deeded over to Judge Nixon. With regard to at least one of those wells, I'm told, the Fairchild Construction Co. also had what's called a working interest—that is, not just the right to receive royalties, but a right of control and direction and direct ownership regarding the well.

So Judge Nixon's share of that bundle of rights that was owned by the Fairchild Construction Co. would be a financial interest that Judge Nixon holds in the affairs of the Fairchild Construction Co.

Second, the second reason that I think that canon 3C(1)(c) is implicated here is that the information provided to me shows that the royalties themselves that the wells threw off were passed through the Fairchild Construction Co. to Judge Nixon, which places the Fairchild Construction Co., I suppose you would say, in the relationship of trustee or fiduciary of Judge Nixon, which is a very direct financial relationship. They were holding funds for his benefit. He was dependent upon the company to disburse the funds promptly, appropriately, to keep an accurate accounting of the funds, and that, I believe, created a financial interest.

Even if it didn't, even if that doesn't create a direct financial interest, it certainly creates the appearance of partiality under canon 5C(1).

Ms. NAUGHTON. Are there any particular advisory opinions on point?

Mr. LUBET. Yes. The Judicial Conference of the United States, in addition to having adopted the Code of Judicial Conduct, issues advisory opinions from time to time at the request of Federal judges who want to do the right thing. There is one particular advisory opinion, which I think is No. 56 issued in 1978, that dealt with the question of the financial relationship between a judge and his former law firm. The situation is that obviously judges have practiced law before they take the bench. If a judge has been a member of a law firm, there will be accounts receivable and paybacks of equity in the firm and financial obligations that are due from the firm to the judge following retirement.

What governs this is that the judge may receive funds from the law firm following the time that he takes the bench so long as those are monies that were earned before while the judge was with the firm. You can't have a future interest in the income of the law firm, but the judge can receive funds that were earned before the time he took the bench. But then, and this is the important part, the advisory opinion 56 says while the judge is receiving those funds from the law firm he cannot sit on the law firm's cases. It is while previously earned money is being passed through the law firm to the judge that the judge cannot sit on cases involving that law firm.

I think that is directly applicable here. The judge was receiving money—I don't know if one would say previously earned. I suppose it is previously earned by virtue of the previous purchase of the money leases, mineral deeds passing through the Fairchild Construction Co. to the judge that would lead one under opinion 56 to say that he could not sit on cases involving the Fairchild Construction Co.

Ms. NAUGHTON. Going to some other conduct that has come before the committee, you mentioned that you reviewed Professor Hazard's opinion letter regarding Judge Nixon's conduct, which at the time excluded the fact that he was sitting on these two cases ecause at the time that hadn't been discovered yet so Professor Iazard's opinion letter was simply as to Judge Nixon's conduct excluding the two cases.

As you apply those facts to canon 2, specifically regarding Judge Vixon's conversations with both Wiley Fairchild and Bud Holmes egarding Mr. Holmes' handling of the Drew Fairchild drug case, lo you come to any conclusions regarding Judge Nixon's discussion vith Mr. Fairchild and then Mr. Holmes regarding that particular lrug case?

Mr. Lubet. Yes. It seems to me that those discussions as the facts vere presented in Professor Hazard's letter lead me to a different onclusion, that Judge Nixon was utilizing the prestige of his office o advance the private affairs of another.

Ms. Naughton. Could you tell us how you reached that concluion?

Mr. Lubet. Yes. Judges hold their office 24 hours a day. They are mbued, I think, and I always regard judges this way, as figures of uthority and respect, admiration by virtue of the judgeship and he life tenure that they hold in the U.S. judiciary, and should not ct in such a way as to advance the private interests of others, eriod, certainly not to the extent of—"intervening" is too strong a vord, but almost intervening, or involving themselves in other ending judicial proceedings for the purpose of exerting any influnce on a private party or a prosecutor or anyone else involved in nother judicial proceeding. It is inescapable that a Federal judge vho does that will be utilizing the prestige of the position that he iolds.

Now, Professor Hazard suggested that that was not the case in his particular situation because the individuals were old friends, lthough I don't think that vitiates a judgeship. Second, it was suggested that Mr. Holmes would not ever have cases, since he was a State district attorney, would not ever have cases that came up in Federal court. But I don't believe that to be the case.

I am not completely familiar or at all familiar with Mississippi ractice, but I do know that convictions that are obtained by a tate prosecutor are reviewable on habeas corpus by Federal disrict court judges. So virtually any one of Mr. Holmes' prosecutions vould be subject not to direct judgment but to collateral review by Judge Nixon.

It is also possible that there would be injunctive proceedings or ivil rights act cases that could be brought and often are brought gainst local prosecutors, and it certainly happened in Mississippi, hat would come before Federal judges.

So I think that Mr. Holmes was a person who was situated to ave his acts and his actions reviewed by Judge Nixon and that herefore it violated the canon when Judge Nixon attempted to discuss a pending case with the local prosecutor.

Ms. Naughton. In fact isn't there something in the code that rohibits a judge from even acting as a character witness on behalf f a friend in litigation?

Mr. Lubet. The code requires that judges not voluntarily testify s character witnesses. A judge has to respond to a subpoena, of ourse, the same as any other citizen, but a judge should not underake it voluntarily to act as a character witness. To the extent, of course, that Judge Nixon was providing character information, that would violate at least the spirit, if not the letter, of that provision.

Ms. **NAUGHTON**. In your analysis you mentioned the possibility that Bud Holmes might have been influenced by what Judge Nixon said about the *Drew Fairchild* case. Does it matter in your analysis whether or not Mr. Holmes in fact was influenced in his actions by what Judge Nixon may have said?

Mr. **LUBET**. No. It is the attempt to exert influence, not the result of the influence that would matter. The code has a restriction on the activities of the judge, not on the responses of the person with whom the judge discusses. By the way, I also want to say that motive doesn't matter either. That is, the provision does not require that the judge act with corrupt or bad motive; it is simply a pure restriction. The judges are not to use the power or prestige of the office to advance the interests of another even with the best motive possible.

Ms. **NAUGHTON**. Along those lines, I would like now to turn your attention to the points raised in Mr. Stewart's memo and ask you a question along the same vein. That is, in order for you to conclude that a judge's conduct may have violated the code, do you need first to come to the conclusion that his actions in a particular case were unfair or that he showed some particular bias for or against a party?

Mr. **LUBET**. I see. You mean his actions in the case over which he was presiding?

Ms. **NAUGHTON**. Yes.

Mr. **LUBET**. No, that is exactly what you don't need to show in order to conclude that particular actions violate the Code of Judicial Conduct. It is not an outcome test. One doesn't say there is a code violation plus unfairness in order to reach the conclusion. It is what law professors call an ex ante test. You look at it before the fact, not after, to determine the violation. The provisions of the code are mandatory. They apply whether the judge has been ultimately fair, unfair or you can't tell whether the judge has been fair in the particular case.

I will give you an example. I come from Chicago. We have our own set of experiences with judicial ethics that I suppose are well known throughout the country. One particular judge, a State court judge, Reginald Holtzer, was ultimately tried and convicted in Federal court for soliciting a long series of loans from lawyers who appeared before him. It wasn't one or two cases, it wasn't 10 or 20 cases; there were dozens and dozens of loans from lawyers who appeared before him.

Judge Holtzer's defense, as it were, was that there was no proof that he had ever been unfair in any of the cases where he was taking loans from the lawyers as the lawyers were before him in court. Judge Holtzer says there is no proof that I was ever anything other than completely fair in these cases. It's irrelevant. The point is not whether you were fair or not; the point was that you were taking loans from lawyers who appeared before you.

Ms. **NAUGHTON**. A judge may have had an interest in one of the parties. I am getting to the *Boam* and *Seymour* cases, in particular. Does the fact that both those cases were settled and were not tried and that Judge Nixon's involvement was fairly minimal in terms of a presiding judge influence your conclusion at all? Is that relevant to your analysis?

Mr. LUBET. It is relevant but it does not bear on the conclusion. The purpose of both section 455 and canon 3C is to give the public a right to judges who are not financially implicated in the cases on which they sit. It is a public right. Obviously, it affects the litigants, but it is broader than that. It is more important than that. And it applies to absolutely every case that comes before a Federal judge in Federal court: Dismissed, settled, tried, appealed. It doesn't matter. The point is that the judge cannot sit on a case in any manner whatsoever where the judge is financially implicated.

Ms. NAUGHTON. Does the fact that in the *Boam* case Magistrate Roper heard the majority of the motions, made the majority of the decisions, the nondispositive decisions, influence your conclusion?

Mr. LUBET. No. So long as the case was assigned to Judge Nixon, he was obliged to proceed under section 455 and canon 3C, particularly under the circumstances here as I understand them, which was that Magistrate Roper's decisions were all to be approved or affirmed by Judge Nixon.

Ms. NAUGHTON. In regard to the *Seymour* case, is the fact that Mr. Fairchild was insured up to $500,000 and ultimately was held not to be liable and thus the insurer was the party who actually had to pay some money along with the codefendant, is that relevant to your conclusion that somehow since Mr. Fairchild was a "minimal" party, that the judge did not have a duty to recuse himself?

Mr. LUBET. No. There is no minimal party exception in either section 455 or the code. Many judges go to extreme lengths to make sure that they recuse themselves in every situation where they are financially involved with a party. Recently, in Chicago again, I guess it has been a couple of years now, former Federal District Court Judge Susan Getzendanner appropriately recused herself in a case when she discovered that her new husband's retirement account held interests in unnamed parties in a class action suit, two or three levels of remove, and the seventh circuit actually ended up reviewing that case and ruling that she had necessarily and properly disqualified herself from that particular case.

Also, of course, in the insurance situation, Fairchild Construction is still the named party. Should there be a judgment in excess of policy limits, should the complaint be amended or should the insurance company discover a means of avoiding the coverage, in all of those circumstances the actual financial holdings of Fairchild would have been implicated in the case.

Ms. NAUGHTON. In order to conclude that it was improper for the judge not to recuse himself, would one have to first show that there was some sort of connection between the cases over which he was presiding and the actual oil investments themselves: in other words, some quid pro quo?

Mr. LUBET. No, not at all. Quid pro quo makes it worse, but quid pro quo is not a requirement of either the statute or the Code of Conduct. That is exactly the point, that quid pro quo does not need to be there. It is a prophylactic standard. We require recusal before one even looks at quid pro quo.

Ms. **Naughton**. Does the fact that there may have been a heavy caseload in the Southern District of Mississippi at the time the judge was presiding over these two cases make a difference in your conclusion that he should have recused himself?

Mr. **Lubet**. Every Federal judge has a heavy caseload that I am aware of. The statute applies to all Federal judges. If there is a Federal judge with a light caseload, his or her colleagues in that district probably want to find out about it and transfer some cases. It makes no difference.

Ms. **Naughton**. Would it make a difference, in deciding if recusal was necessary, if Judge Nixon had recused himself and perhaps another judge from an outside district would have had to have been brought in to hear the *Seymour* case?

Mr. **Lubet**. No. Under the old statute that might have been a consideration. Where judges had the duty to sit, one of the reasons was that the recusal was not considered to be important enough to create administrative difficulty. But that is clearly reversed now by the 1972, I think, amendment to 455. The duty to recuse takes precedence over administrative convenience, and bringing in another judge is just the price you pay.

Ms. **Naughton**. So in this particular case, at the time there were three Federal judges: Judge Russell, Judge Nixon, and Judge Cox. We know Judge Russell recused himself because of his connection to a law firm involved.

Mr. **Lubet**. He had a nephew at the law firm, I understand. By the way, that recusal was not necessary. The rules would not require a judge to recuse himself because he has a nephew at the law firm that is handling the case, and that is an example of a judge, I think appropriately, taking extreme precaution to interpret the code and the statute liberally to effectuate the end, which is to err on the side of disqualification.

So you have an example of Judge Russell erring on the side of disqualification in the situation where technically probably he did not have to.

Ms. **Naughton**. So conceivably the case could have been reassigned to Judge Cox or perhaps even Judge Russell.

Mr. **Lubet**. Conceivably, or another judge from a nearby district could have come in to hear it.

Ms. **Naughton**. Finally, is there a different standard of conduct allowable for judges who practice in rural areas as opposed to those from urban areas or midsized towns?

Mr. **Lubet**. No. It is a single unified Code of Judicial Conduct adopted by the Judicial Conference. It is applicable to all U.S. judges, magistrates, bankruptcy judges, and particularly regarding recusal. The standard is national in scope.

Ms. **Naughton**. Finally, I want to ask you about the sanctions that have been imposed for violations of the code. What are the sanctions that can be imposed for violating the Code of Judicial Conduct nationwide?

Mr. **Lubet**. In the State courts, 47 States have adopted the Code of Judicial Conduct, all but Montana, Rhode Island, and Wisconsin. In the State systems, most States allow sanctions up to removal from office for violating the Code of Judicial Conduct. Obviously, that is not something that the U.S. Judicial Conference can do. For violating the Code of Judicial Conduct in the Federal system under the Judicial Discipline and Disability Act there are a variety of reprimands, censure sorts of sanctions for those violations that the circuit councils can impose.

Ms. **Naughton**. On the Federal level what are the limitations on what sanctions the Judicial Conference could impose?

Mr. **Lubet**. They are the limitations created by article III, which is that Federal judges serve during good behavior, and the power to remove from office exists solely with the Congress.

Ms. **Naughton**. Let's say, for instance, a suspension and allowing a judge to take certain cases. Would that be allowable under article III or not?

Mr. **Lubet**. I am going to defer to Professor Kaufman on that.

Ms. **Naughton**. Thank you, Mr. Chairman. I have no more questions.

Mr. **Edwards**. Mr. Sensenbrenner.

Mr. **Sensenbrenner**. Thank you very much.

Professor, I just have one question. Does it make any difference if this matter was referred to a magistrate for action?

Mr. **Lubet**. No, I don't think it does make a difference if the matter was referred to a magistrate for action. The requirements of both the code and the statute is that if the judge has a financial interest that either creates a reasonable belief that he cannot act impartially or if he has got a direct financial interest in the parties, that he must step aside. There is some provision for remittal of disqualification if the judge discloses it on the record, but neither of those things occurred in either of these cases, and there is no provision for referral to a magistrate, particularly where a judge retains the jurisdiction to approve and affirm the magistrate's rulings or to approve any ultimate settlement.

Mr. **Sensenbrenner**. Thank you very much.

Mr. **Edwards**. Mr. James.

Mr. **James**. For disqualification of a judge, what is the remedy for failure to disqualify under section 455?

Mr. **Lubet**. There is no remedy against the judge under section 455. The parties' remedy is to appeal.

Mr. **James**. Correct. So the normal procedure would be to appeal if a judge failed to disqualify. How many instances have you ever found in your research where a judge was attacked or impeached because of his failure to disqualify himself?

Mr. **Lubet**. None under section 455, but quite a few where presiding over cases involving parties with which the judge was financially interested in the State systems have led to suspension, removal from office.

Mr. **James**. Please answer my question. When he failed to disqualify himself in a Federal case.

Mr. **Lubet**. Oh, in a Federal case. There is not one in a Federal case.

Mr. **James**. Do you know of one in a State case simply because he failed to disqualify himself?

Mr. **Lubet**. Yes, certainly. The point is——

Mr. **James**. Other than the substantive conduct. I'm talking about because he failed to grant the motion for disqualification.

Mr. **Lubet**. Oh, because of failure to grant a motion for disqualification?

Mr. **James**. Yes.

Mr. **Lubet**. I can't offhand think of a case with that particular factual situation.

Mr. **James**. You get my point. Obviously, if it is criminal acts which was the basis of the motion for disqualification, of course he would be disqualified.

Mr. **Lubet**. No, no. But there are cases, Congressman, that don't involve criminal acts where the judge has sat on cases while receiving loans or favors from parties to the litigation and did not disclose that to the other parties and went ahead and ruled on the cases.

Mr. **James**. I'm talking specifically under 455.

Mr. **Lubet**. Under 455, as I told you, there are no cases.

Mr. **James**. That is what I'm talking about.

Mr. **Lubet**. Under canon 3C, which applies to 47 States——

Mr. **James**. We will get to that in a minute.

Mr. **Lubet**. Certainly. I am sorry. Under 455 there are no cases.

Mr. **James**. Now, have the Federal judges adopted the ABA standards?

Mr. **Lubet**. The Judicial Conference has adopted the Code of Judicial Conduct.

Mr. **James**. The Judicial Conference made up of whom, only Federal judges?

Mr. **Lubet**. Yes.

Mr. **James**. State judges?

Mr. **Lubet**. Federal judges.

Mr. **James**. They have adopted it.

Mr. **Lubet**. Yes.

Mr. **James**. And they have the power to adopt rules for other judges.

Mr. **Lubet**. Yes.

Mr. **James**. By what codification in the statute?

Mr. **Lubet**. It would be title 28, sections 331 and 372(c).

Mr. **James**. Do you have it handy there?

Mr. **Lubet**. I don't.

Mr. **James**. Enacted by Congress.

Mr. **Lubet**. Yes.

Mr. **James**. And they adopt standards to adhere to. Do they have a disciplinary procedure to follow up in case there is a breach? In other words, a specific remedy for a specific breach of a canon?

Mr. **Lubet**. Yes.

Mr. **James**. So in each of these cases, what is the remedy? If you find that you breach a specific canon, where are the remedies specified?

Mr. **Lubet**. The Judicial Conduct, Judicial Disability and Judicial Council's Reform Act creates a regime, a system for receiving complaints involving Federal judges, for adjudicating those complaints and for imposing a series of remedies, a possible series of remedies.

Mr. **James**. And who imposes the series of remedies?

Mr. **Lubet**. Pardon?

Mr. **James**. And who imposes those series of remedies?

Mr. **Lubet**. Under the Judicial Council's Reform Act, it would be the Circuit Judicial Council or the Judicial Conference if the Circuit Judicial Council refers the case to the Judicial Conference.

Mr. **James**. Was that done in this case, do you know?

Mr. **Lubet**. I don't think it was but I don't know.

Mr. **Edwards**. Yes, it was.

Mr. **Lubet**. I don't know the answer, Congressman.

Mr. **James**. Did you follow the rulings on that?

Mr. **Lubet**. Pardon?

Mr. **James**. Did you examine what the results were in those——

Mr. **Lubet**. No, I'm not aware of them.

Mr. **James**. Did you make a determination whether any of these breaches of the ethical code was, in fact, a misdemeanor in office?

Mr. **Lubet**. I did not.

Mr. **James**. You are just testifying as to what is ethical or inappropriate.

Mr. **Lubet**. Yes, sir.

Mr. **James**. Do you know of any treatise that will tell us whether or not an ethical violation is a misdemeanor in office?

Mr. **Lubet**. I assume it would be a case-by-case determination.

Mr. **James**. Yes, but I am talking about history of judges, Federal judges. I haven't done any specific research on it.

Mr. **Lubet**. Oh, I see; whether an ethical violation per se.

Mr. **James**. Yes.

Mr. **Lubet**. I am not familiar with any source that you could look to for that.

Mr. **James**. Are you aware of any case where an ethical violation per se involved an impeachment case?

Mr. **Lubet**. No, sir, I am not.

Mr. **James**. Did you make a determination as to whether Holmes, the prosecutor, ever appeared before Judge Nixon in his capacity as the State prosecutor?

Mr. **Lubet**. No, sir.

Mr. **James**. Are you aware of the procedures involving State prosecutors in that particular State?

Mr. **Lubet**. I don't understand your question.

Mr. **James**. Do you know whether or not the procedure within that State attorney's office would require him ever to appear before a Federal judge?

Mr. **Lubet**. I don't know.

Mr. **James**. You mentioned habeas corpus.

Mr. **Lubet**. The convictions that he obtains clearly would be reviewable on habeas corpus by the Federal judge in the district. I don't know whether he himself would appear in those. Probably the State attorney general would.

Mr. **James**. Isn't it normal in most State attorney's offices—I know it is in my State—that if you involve any kind of Federal representation, you have specialized attorneys handling it and it is not the normal State attorney that handles it?

Mr. **Lubet**. Yes. I hope I didn't apply that he would appear, only that the convictions that he obtains would be reviewed.

Mr. **James**. I just wondered why you mentioned that because the norm as I understand is it would never happen that a normal state attorney would appear.

Mr. LUBET. No. My point, Congressman, is that I know a lot of State prosecutors, they care about their convictions, they want to be upheld on appeal, they want to be upheld on habeas corpus, whether they are in the courtroom or not. So he would not appear, but his actions would be reviewed.

Mr. JAMES. In us considering whether or not there should be any action taken, to what extent should we weigh a breach of ethics in relationship to a misdemeanor in office?

Mr. LUBET. I have no opinion on that, Congressman. That is your decision.

Mr. JAMES. But you are an expert in the area of ethics.

Mr. LUBET. I try to be. I do my best.

Mr. JAMES. And yet even you can't tell us how to use a potential ethical violation in relationship to an impeachment process involving a misdemeanor in office?

Mr. LUBET. I think your obligation is to take the information and make a decision, and I don't presuppose to be able to hold forth on that. I just have no opinion on that.

Mr. JAMES. I was just hoping maybe in your examination of all of the issues surrounding ethics, that you could show us how it connected to perhaps a misdemeanor in office, by your research or a treatise, et cetera.

Mr. LUBET. I think we are fortunate that the issue has not come up very often in the Federal system, so I just don't know the answer. Now, in various State systems I could give you some analogies, but regarding the Federal law of impeachment, the relationship between the Federal law of impeachment and the Code of Judicial Conduct, I have no information to offer.

Mr. JAMES. As bad as a particular breach of ethics might be, unless I can see a connection, I'm not sure whether I should consider it totally irrelevant or not except for the substantive allegations as they relate to misdemeanor in office. Do you understand what I am saying?

Mr. LUBET. I understand what you are saying, and I think that is the stuff on which your committee is going to deliberate, and I have nothing to offer on that.

Mr. JAMES. So you can't tell me even, in fact, whether your testimony is relevant as it relates to ethics for the purposes of determining if there was a misdemeanor in office.

Mr. LUBET. I think my testimony is relevant to the question of breaches of the Code of Judicial Conduct, and whether that is something that you wish to consider is within your judgment, Congressman, not mine.

Mr. JAMES. That is up to us. You can't help us with that.

Mr. LUBET. I can't. No, sir.

Mr. JAMES. Thank you very much.

Mr. EDWARDS. Professor Lubet, in State courts you testified that sometimes judges are removed from office because of breach of ethics.

Mr. LUBET. Absolutely.

Mr. EDWARDS. What kind of a process does that involve?

Mr. LUBET. Every State now has created what can generically be called a judicial conduct organization. They exist in all 50 States. Judicial conduct organizations are bodies that are charged with the discipline of the State court judiciaries. Now, every one is different, and there are 50 of them. Typically what happens is that a complaint for a breach of the Code of Judicial Conduct is filed against a judge, there is an investigation, an inquiry, a hearing to determine whether or not the complaint is true, and if it is true, how serious it is.

Upon a determination that the facts in the complaint are correct, either the judicial conduct organization itself, as is the case in Illinois, the judicial conduct organization imposes a sanction on the judge or it refers the matter to the State supreme court, and the State supreme court would impose a sanction on the judge. Those sanctions in, I think, every State, certainly in Illinois, New York, California, the States that generate a fairly large volume of these matters, range from private reprimand to removal from office.

Mr. **Edwards**. Has any State judge been removed from office for having a financial interest and not recusing himself?

Mr. **Lubet**. Yes. Typically, the language of the phrasing wouldn't be failure to recuse; it would be, I guess, continuing to sit, same thing, but typically the language of the opinion is going to be that the judge sat on a case that involved a party with whom the judge had a financial relationship, thereby violating the Code of Judicial Conduct. Many State judges have been disciplined, including removal from office, for activity that included that sort of conduct.

Mr. **Edwards**. Can you furnish later for the subcommittee a few of those cases?

Mr. **Lubet**. Yes.

Mr. **Edwards**. I have no further questions.

Mr. **James**. You are talking, though, about State judges, are you not?

Mr. **Lubet**. Yes, sir.

Mr. **James**. You recognize there is a substantial difference between the disciplinary proceedings provided in State constitutions and the discipline of those judges and the ethical rules that often appear in those constitutions and that of a Federal judge, do you not?

Mr. **Lubet**. That is why I refused to answer your earlier questions, Congressman. I do recognize the difference. Although actually the codes are the same between the Federal system and 47 States, the question of judicial removal is different.

Mr. **James**. Correct. We are dealing with a Federal standard, a constitutional standard that we must find a misdemeanor in office or a high crime or whatever the other language is by constitution, whereas different States have different standards and they even specifically provide in their constitution for ethical considerations and ethical committees, as it does in my State. So you are really talking apples and oranges when you talk about applying standards to either a Federal judge or a State judge, are you not?

Mr. **Lubet**. The only thing I am talking about is the Code of Judicial Conduct, Congressman. In looking at violations, the standards, I think, are the same. In looking at the consequences of the violations, the standards certainly are not the same.

Mr. **James**. I think in my State, for example, of Florida it would make a great deal of difference. One would be a violation of the code may very well be grounds for the removal, whereas in the case of a Federal judge I don't think there is a direct connection because of the Constitution and constitutional requirements.

Mr. **Lubet**. Yes. Florida has what is called a judicial qualifications commission that is empowered to suspend and remove judges from office subject to approval by the State supreme court.

Mr. **James**. And provided for in the Constitution.

Mr. **Lubet**. Yes, sir.

Mr. **James**. And by the way, to my knowledge, disqualification certainly per se or failure to disqualify does not relate to ethics unless it relates to another ethical rule.

Mr. **Lubet**. Well, unless it relates to holding a financial interest in a party while ruling on the case.

Mr. **James**. Yes, in that case it would.

Mr. **Lubet**. Yes, sir.

Mr. **James**. But the failure to disqualify itself is not a grounds for attack.

Mr. **Lubet**. I don't think that is accurate, Congressman.

Mr. **James**. It might be, depending on the factual situation is what I am saying.

Mr. **Lubet**. Yes, sir.

Mr. **James**. Because there is both a civil and a criminal statute involved in each case, and nothing is mentioned about failure to recuse per se except if you have got a specific ground. There may be a failure to recuse legitimately where the judge disagrees and the appellate court may think he is wrong on the issue of bias.

Mr. **Lubet**. Yes, sir. If a judge commits an error of law on the question of, say, personal bias regarding a party, that no doubt would not be grounds for discipline. Of course, under most of those circumstances the judges say something. They say one might think that I should recuse myself here but I'm not going to. That is, they put the information on the record so that the parties can preserve the issue for appeal if they are interested in doing that.

Mr. **Sensenbrenner**. Mr. Chairman.

Mr. **Edwards**. Mr. Sensenbrenner.

Mr. **Sensenbrenner**. Professor, I would like to ask your opinion on the judge's obligation to disclose a financial interest in a party to the litigants, and what effect that has on the fact situation we are talking about this morning.

Mr. **Lubet**. Yes, sir. Under both section 455 and canon—actually, I guess it would be canon 3D of the Code of Judicial Conduct, a judge who has a financial interest who opts not to disqualify himself is obliged to disclose the interest.

Mr. **Sensenbrenner**. Is that supposed to eliminate the requirement for the attorneys to do a financial investigation on the judge so that they don't have to come up with the evidence, with a motion for recusal? The judge would furnish them with the information and then the attorneys could proceed?

Mr. **Lubet**. It is done for two reasons. One reason is in circumstances where a judge believes he has an interest but it is too insubstantial to require disqualification. The parties may disagree and may press the judge on the issue and change his mind. Or if the judge doesn't change his mind, the parties then have a record on which they can proceed in an appellate court. That is one reason.

The second reason is the judge may have an interest that technically requires disqualification but that the parties don't care about. Maybe the parties want to have that judge anyhow, and there is a procedure for the judge to disclose the financial interest for the parties to waive it. "Remit" is the term used in the Code of Judicial Conduct, to remit the disqualification.

Under section 455, however, disqualification that is required because the judge has a financial interest in a party cannot be remitted. That is, even if the parties say, judge, we don't care, we want you to hear the case, the judge can't. It is simply an unwaivable disqualification. Interestingly, canon 3D of the Code of Judicial Conduct as adopted by the U.S. Judicial Conference was amended subsequent to the enactment of the new section 455 to comply with that nondisqualification requirement.

So under both the Federal Code of Judicial Conduct and section 455, a judge's financial interest in a party cannot be waived by the litigants.

Mr. SENSENBRENNER. Now let me give you this specific fact scenario relative to the case of *Seymour* v. *L&A Contracting Co.* On March 16, 1982, Judge Nixon had received $7,476.55 in royalties from Fairchild. He made a $5,000 payment to Fairchild Construction Co. on the notes. One month later, on April 16, 1982, Judge Nixon held a pretrial conference. The counsel for Fairchild was present, and Nixon directs the parties to explore a possible settlement.

Is that a scenario where there is a clear requirement for recusal or is it merely a scenario where a disclosure of these financial transactions should have been made to the parties prior to the pretrial being held?

Mr. LUBET. It is both. I think there is absolutely a clear requirement for recusal under that situation. As I said before, I think Judge Nixon had a financial interest in Fairchild Construction Co. that requires recusal, and it cannot be waived by the parties. Now, if one were to say that Judge Nixon's interests in these oil wells did not amount to a financial interest in the Fairchild Construction Co., the first part of the rule says that a judge must disqualify himself in any case where his impartiality might reasonably be questioned.

I don't think there is any doubt that this is one of those circumstances where his impartiality might reasonably be questioned. If that is the basis for recusal, it is waivable by the parties, but in order to do that the judge must disclose the interest to all of the parties on the record, then he must withdraw, figuratively if not literally, to allow the parties to reach a decision about whether to remit disqualification without participation by the judge.

I might point out that the Judicial Conference of the United States has published a guideline procedure for doing that which involves having the judge completely step aside from the disqualification proceeding, having the clerk inform the parties of the judge's financial interest, and then having the parties inform back the clerk, not the judge, whether or not they want to waive the disqualification.

The point is that the judge is not even supposed to know which party, if any, has declined to waive the judge's disqualification. The judging and the finances are just to be kept absolutely separate.

Mr. **Sensenbrenner**. Thank you very much.

Mr. **Edwards**. Mr. Stewart, you may question the witness.

Mr. **Stewart**. Thank you, Mr. Chairman.

Good morning, Professor Lubet.

Just on the question of the State cases, I take it there are plenty of State cases where there was an ethical violation by the judge and he was not removed from office.

Mr. **Lubet**. Yes, sir.

Mr. **Stewart**. It is not a uniform response that as soon as there is an ethical violation, the State court removes the judge.

Mr. **Lubet**. No, no. I didn't mean to suggest that.

Mr. **Stewart**. When you are determining that sanction, you would ordinarily look at all the circumstances of the case; is that right?

Mr. **Lubet**. Yes, sir, all the circumstances and surrounding circumstances.

Mr. **Stewart**. And you might look into questions as to whether it appeared to be an intentional or an inadvertent violation.

Mr. **Lubet**. Yes, sir.

Mr. **Stewart**. And you have written, I believe, that most violations of judicial ethics appear to be inadvertent.

Mr. **Lubet**. Well, inadvertent in the sense of not undertaken intentionally to violate the code. That is, it is intentional activity but inadvertently violative of the code.

Mr. **Stewart**. I just copied it out of your article.

Mr. **Lubet**. Well, I think if you keep reading you will see that it says knowing but nonculpable. That is the Nebraska Law Review article?

Mr. **Stewart**. Yes, it is.

Mr. **Lubet**. Yes. It is inadvertent violation though intentional conduct, is my point.

Mr. **Stewart**. All right. So they not intend to do anything wrong.

Mr. **Lubet**. They didn't set out to do wrong.

Mr. **Stewart**. Right. Now, you have also written that judges often deemphasize the importance of ethical issues, in your experience talking to judges.

Mr. **Lubet**. Yes, sir.

Mr. **Stewart**. That is a characteristic of judges generally, in your experience.

Mr. **Lubet**. It is a characteristic of many judges generally.

Mr. **Stewart**. All right. And you have found that many judges are not sufficiently sensitive to ethical problems by your lights. Is that right?

Mr. **Lubet**. Not sufficiently knowledgeable.

Mr. **Stewart**. And I believe a phrase I found was that you wrote judges run afoul of the Code of Judicial Conduct out of ignorance or inattention.

Mr. **Lubet**. Yes, sir.

Mr. **Stewart**. Does that sound right to you?

Mr. **Lubet**. Yes, sir.

Mr. **Stewart**. And that is what you have found.

Mr. **Lubet**. Yes, sir.

Mr. **Stewart**. The question of whether the violation was due to inattention or ignorance would be relevant in determining whether that violation requires a particular sanction, of course, wouldn't it?

Mr. **Lubet**. Sometimes. It depends on what the judge was inattentive or ignorant of. There is willful ignorance, for example.

Mr. **Stewart**. And I believe you have also written that a failure to recuse is ordinarily undertaken with no intent to violate standards to which judges are held.

Mr. **Lubet**. Yes.

Mr. **Stewart**. You hold that.

Mr. **Lubet**. It is normally undertaken in that manner, yes.

Mr. **Stewart**. And a judge's inadvertent failure to recuse would ordinarily not be a basis for removal.

Mr. **Lubet**. A judge's purely inadvertent failure to recuse would normally not be a basis for removal.

Mr. **Stewart**. I want to ask you about a case in Chicago—you mentioned that is where you are from—called "In Re Murphy." It involved a Federal judge that was referred to in our memorandum, Judge Cocoras. You are familiar with the case?

Mr. **Lubet**. Yes, sir.

Mr. **Stewart**. Judge Cocoras presided over a long trial which was prosecuted by a U.S. attorney who was a friend of his; correct?

Mr. **Lubet**. Yes. I think his best friend.

Mr. **Stewart**. And throughout that entire trial, Judge Cocoras never disclosed to the parties that he intended to take a vacation with that prosecutor as soon as the trial ended. Is that right?

Mr. **Lubet**. That is correct.

Mr. **Stewart**. And the seventh circuit ruled and didn't have any real trouble finding that that was an ethical violation, that he should at least have disclosed it, and he probably should have recused himself.

Mr. **Lubet**. I think they were stronger about it than that. I think they said it was beyond question and ethical violation and the judge absolutely should have disclosed it.

Mr. **Stewart**. And you agree with that.

Mr. **Lubet**. Yes, sir.

Mr. **Stewart**. You went farther than the seventh circuit, though, in that it is your view that the conviction in that case should have been reversed as well; is that right?

Mr. **Lubet**. Yes, sir.

Mr. **Stewart**. The seventh circuit was unwilling to do that.

Mr. **Lubet**. The seventh circuit did not reverse the conviction.

Mr. **Stewart**. So the need for Judge Cocoras to recuse in that situation was not a close question, in your judgment.

Mr. **Lubet**. I think not.

Mr. **Stewart**. It was surely not inadvertent. The prosecutor was in front of him and he knew his vacation plans.

Mr. **Lubet**. Actually, I think it was inadvertent.

Mr. **Stewart**. Can you explain that?

Mr. **Lubet**. Yes, and this is also the same reason that the seventh circuit didn't reverse it. The defense lawyer in the case was the third best friend of Judge Cocoras and the prosecutor, Dan Webb, and actually they had practiced law together before Mr.

Webb was the U.S. attorney, and I think Judge Cocoras assumed inadvertently that Mr. Lydon, the defense lawyer, knew everything about the relationship between the judge and the prosecutor and assented to it.

Mr. STEWART. You have written that although you agree this was a clear ethical violation, that you continued to respect Judge Corcoras and you would continue to consult with him on matters of ethics?

Mr. LUBET. Yes, I would.

Mr. STEWART. And you have high regard for his personal ethics.

Mr. LUBET. For Judge Corcoras and for Mr. Webb, although I think they erred in that case.

Mr. STEWART. So the fact that he blundered in this case doesn't lead you to conclude he is unfit to serve as a Federal judge.

Mr. LUBET. That is correct.

Mr. STEWART. Now, you were asked by Congressman James this question. I just want to be absolutely clear. In the Federal system, and we have looked at the Judicial Conference reports of their sanctioning process under the Judicial Disability Act, are you aware of any case in which a judge has even been publicly censured for a failure to recuse?

Mr. LUBET. By the Judicial Councils?

Mr. STEWART. Yes, or the Judicial Conference.

Mr. LUBET. Not by the Judicial Councils or the Judicial Conference. I think Judge Cocoras was essentially censured by the seventh circuit in the *Murphy* case.

Mr. STEWART. But not through this separate disciplinary procedure.

Mr. LUBET. Not through the separate disciplinary procedure.

Mr. STEWART. And of course, no such case has ever been referred to Congress for impeachment, you said.

Mr. LUBET. Not that I am aware of. I'm sure not.

Mr. STEWART. I wanted to ask you just a couple questions about the loan issue. The fact statement you were given, paragraph 17, stays that until February 1981 Judge Nixon intended to take a bank loan to finance this investment. Is that in accord with your recollection? You can refer to it.

Mr. LUBET. Paragraph 17, yes.

Mr. STEWART. The *Boam* case was dismissed by January 1980, isn't that right, more than 13 months before February 1981?

Mr. LUBET. Yes.

Mr. STEWART. So the loan issue doesn't arise in connection with the *Boam* case.

Mr. LUBET. The loan issue does not. The business negotiation issue does.

Mr. STEWART. Let me ask quickly about the conversation with Mr. Holmes, the State court prosecutor.

Mr. LUBET. Yes, sir.

Mr. STEWART. You have reviewed Professor Hazard's letter.

Mr. LUBET. Yes, sir.

Mr. STEWART. He is a respected commentator in your specialty, is he not?

Mr. LUBET. Professor Hazard is a respected commentator in many specialties, and legal ethics is one of them.

Mr. STEWART. In fact, if you even look at exhibit 11, which is the Code of Judicial Conduct, his name appears on the second page along with the list of committee members. Is that right?

Mr. LUBET. Yes, sir.

Mr. STEWART. He assisted in the drafting of the code.

Mr. LUBET. Yes, sir.

Mr. STEWART. And you disagree with his analysis of that matter.

Mr. LUBET. Yes, sir.

Mr. STEWART. Let me ask a couple of questions about the financial interest analysis you offered. Your first concern you mentioned—you mentioned two concerns. The first was that Fairchild had a working interest in one of the wells. Is that correct?

Mr. LUBET. Yes.

Mr. STEWART. Do you know what the size of his working interest was?

Mr. LUBET. I don't know.

Mr. STEWART. Do you know what a working interest consists of?

Mr. LUBET. I believe I do.

Mr. STEWART. What is that?

Mr. LUBET. I believe it consists of a greater interest than simply the right to receive royalties but an interest in controlling and managing the conduct of the investment.

Mr. STEWART. What management decisions does a working interest holder make?

Mr. LUBET. I don't know.

Mr. STEWART. Does a working interest holder have to share intangible drilling costs?

Mr. LUBET. I don't know.

Mr. STEWART. How about intangible drilling costs? Does a working interest holder have to share in those?

Mr. LUBET. I don't know.

Mr. STEWART. What size is the customary working interest in an oil well?

Mr. LUBET. I couldn't tell you.

Mr. STEWART. Are they usually 50 percent or 20 percent?

Mr. LUBET. I couldn't begin to tell you.

Mr. STEWART. Two percent.

Mr. LUBET. I don't know.

Mr. STEWART. Do you think you could have such a small working interest that it would turn out that you really didn't have any control of the well?

Mr. LUBET. The requirement under the Code of Judicial Conduct is that the judge cannot have any interest, however small. There is no such thing as a diminimus financial interest.

Mr. STEWART. Would you want to know, before offering an opinion that the working interest in Fairchild Construction Co. gave Judge Nixon a financial interest in the Fairchild Construction Co., what exactly a working interest is?

Mr. LUBET. I would want to know the general outline of the meaning of the working interest. That was provided to me by counsel for the committee. I don't need to know the specifics.

Mr. STEWART. It didn't occur to you to go look it up.

Mr. LUBET. I did not look it up.

Mr. STEWART. And you didn't go ask an oil and gas lawyer.

Mr. Lubet. I did not.

Mr. Stewart. And you didn't ask how big the working interest was in this case.

Mr. Lubet. I didn't.

Mr. Stewart. Let me ask a related question, actually. What if Judge Nixon had no idea—this has to be a hypothetical question. What if he had no idea that Fairchild had a working interest? Would that make a difference to you in determining whether there was a violation?

Mr. Lubet. Under canon 5C(3)(c) or a violation generally?

Mr. Stewart. I will take it any way you want to answer.

Mr. Lubet. It would not make a difference regarding my opinion that there was a violation, and it might make a difference regarding my opinion concerning that specific violation, that specific part of the violation.

Mr. Stewart. But that is the sort of thing that would be relevant to the type of sanction you would want to impose.

Mr. Lubet. Yes, although I do want to point out that the judge has the obligation to know the nature and extent of his financial interests, so to say that the judge didn't know whether or not Fairchild had a working interest would point out that he did not undertake the obligation to fully understand the nature of his financial interests.

Mr. Stewart. Let me ask you about the second concern you expressed on financial interest, which was the fact that the royalty monies themselves passed through Fairchild Construction. Hypothetically let me suggest that what if there had been a royalty division order entered. Are you familiar with royalty division orders?

Mr. Lubet. I am familiar with the term.

Mr. Stewart. Had been entered, which meant that the operator of the field, say Getty Oil, someone other than Fairchild, paid the royalties directly to Judge Nixon, didn't go through Fairchild Construction. In those circumstances then would your second concern have been answered?

Mr. Lubet. The money would be paid——

Mr. Stewart. The check comes from Getty Oil to Walter L. Nixon, Jr.

Mr. Lubet. And does not pass at all through the Fairchild Construction Co.

Mr. Stewart. Correct.

Mr. Lubet. That would be a relevant consideration.

Mr. Stewart. It doesn't answer the problem?

Mr. Lubet. It answers the particular problem about the fiduciary relationship.

Mr. Stewart. That was my question.

Mr. Lubet. It answers the particular problem about the fiduciary or trustee-like relationship between Judge Nixon and the Fairchild Construction Co. There is a residual problem left over, though.

Mr. Stewart. An appearance problem.

Mr. Lubet. Well, there might be more to it than that, if you would like me to explain.

Mr. Stewart. I am sure we have heard it.

The royalties were passed through Fairchild. Your concern was simply, as I understand it, that there were a number of such transactions and therefore the money—I think what you said was Judge Nixon depended on the money coming from Fairchild. Isn't that right?

Mr. **Lubet**. I said that. My point was that there was an ongoing reciprocal financial relationship between the judge and the party to the litigation.

Mr. **Stewart**. All I am trying to clarify is that that was his money. Is that right?

Mr. **Lubet**. I believe so.

Mr. **Stewart**. It wasn't Fairchild's money. It is just a matter of administrative convenience that it happened to pass through Fairchild.

Mr. **Lubet**. I don't know that, that it was a matter of administrative convenience, but the fact that the judge had a right to the money is accurate, as far as I know.

Mr. **Stewart**. I have no further questions, Mr. Chairman.

Mr. **Edwards**. Thank you very much, Professor.

Our next witness is Prof. Andrew Kaufman of Harvard Law School. We welcome you.

[Witness sworn.]

Mr. **Edwards**. Counsel Alan Baron will question the witness.

Mr. **Baron**. Thank you, Mr. Chairman.

Mr. **Baron**. Good morning, Professor Kaufman.

STATEMENT OF ANDREW KAUFMAN, PROFESSOR OF LAW, HARVARD LAW SCHOOL

Mr. **Kaufman**. Good morning.

Mr. **Baron**. Professor Kaufman, would you please state for us first your present occupation?

Mr. **Kaufman**. I am a professor of law at the Harvard Law School and associate dean there.

Mr. **Baron**. How long have you been associated with the Harvard Law School?

Mr. **Kaufman**. Since 1965.

Mr. **Baron**. Prior to that time did you engage in the private practice of law?

Mr. **Kaufman**. Yes, I did.

Mr. **Baron**. For how many years?

Mr. **Kaufman**. For almost 10 years.

Mr. **Baron**. Was that a general practice?

Mr. **Kaufman**. It was a general practice in a small firm in Newark, NJ.

Mr. **Baron**. Coming back to your tenure as, I believe it is, Charles Stephens Fairchild Professor of Law at the Harvard Law School, what are the subject areas in which you generally teach?

Mr. **Edwards**. Mr. Baron, we would have a break for 10 minutes.

[Recess.]

Mr. **Edwards**. The subcommittee will come to order.

Mr. Baron, you may proceed.

Mr. **Baron**. Professor Kaufman, I believe we had left off you had told us you are professor of law at the Harvard Law School, and prior to that time for 10 years you were a practicing attorney in a general practice. I think I had just come back to the question of the subject areas which you teach and have taught at Harvard.

Mr. KAUFMAN. I teach courses in professional responsibility, constitutional law and commercial law.

Mr. BARON. And professional responsibility would cover also the area of what we would think of as professional ethics.

Mr. KAUFMAN. Yes.

Mr. BARON. Have you published in the field or edited books in the field of professional responsibility, including specifically the area of ethical conduct?

Mr. KAUFMAN. I have a book on professional responsibility that is used as a textbook in professional responsibility courses in law schools. I started work on that in the late 1960's. It has gone through two editions and the third edition is coming out next month.

Mr. BARON. Have you written on the subject of judicial ethics other than the referral to your case book?

Mr. KAUFMAN. There has been a chapter on judicial ethics in that case book since the beginning. More recently, last spring, I participated in a symposium with the judges of the ninth circuit for 2 days on questions of judicial ethics, and an article is forthcoming in the Washington Law Review this fall.

Mr. BARON. In your professional work outside the law school with the bar association, particularly in terms of Massachusetts, have you held any positions relative to committees dealing with ethical issues?

Mr. KAUFMAN. Two committees. I have been a member of the Ethics Committee of the Massachusetts Bar Association since 1977 and chairman since 1980. We write opinions, lots of them, every year on ethics questions. Since last fall I have been a member of the Committee on Judicial Ethics, appointed by the Supreme Judicial Court of Massachusetts. There are four judges, and I am the token nonjudge on the committee.

Mr. BARON. In anticipation of your testimony here this morning, can you review for us briefly the materials that you reviewed prior to coming here today?

Mr. KAUFMAN. Essentially, I reviewed the same materials that Professor Lubet has described. It is the packet of materials that were supplied by counsel to counsel for Judge Nixon, the materials relating to the *Boam* and *Seymour* cases, the chronology, the letter setting forth the facts, the opinion of the court of appeals in the criminal case, and I did some research relating to the issues that you asked me to consider.

Mr. BARON. In fact, for the record I think we ought to make it clear you, in fact, sat through Professor Lubet's testimony this morning from beginning to end, did you not?

Mr. KAUFMAN. Yes, I did.

Mr. BARON. And you heard all of his testimony.

Mr. KAUFMAN. I certainly did.

Mr. BARON. Now, at our request did you undertake to address certain questions with regard to the conduct of Judge Nixon relative to his meeting the standards of the Code of Judicial Ethics and also the statutory standard contained in 28 United States Code, section 455?

Mr. KAUFMAN. Yes, I did.

Mr. BARON. Could you state for us what those questions were to which you addressed your attention?

Mr. KAUFMAN. I addressed four questions. The first was were the discussions between Judge Nixon and Mr. Ingram, a violation of the Code of Conduct? The second was were the financial dealings with Mr. Fairchild and Fairchild Construction Co. a violation of the Code of Conduct? The third was did those financial dealings require Judge Nixon to recuse himself in the *Boam* and *Seymour* cases under both the Code of Conduct and 28 U.S.C. 455? And finally, was the conversation with Mr. Holmes about the drug case involving Mr. Fairchild's son a violation of the Code of Conduct?

Mr. BARON. Did you form conclusions with regard to each of the four questions that you have just recited?

Mr. KAUFMAN. Yes, I did.

Mr. BARON. I am going to ask you to take them—I guess the simplest way might be one by one to state for us what your final conclusion was.

Mr. KAUFMAN. All right. It actually might be easier if I took the first two questions together, the discussion with Mr. Ingram and the financial dealings with Fairchild Construction Co. I answered both of those questions that yes, there were violations of the Code of Conduct in each instance.

I start with the canon that has been discussed already this morning, 5C(1). Canon 5C(1) has four pieces to it. Under the heading of financial activities, there are four kinds of proscribed financial and business dealings: One, those that adversely reflect on the judge's impartiality; two, those that interfere with the proper performance of judicial duties; three, those that exploit the judicial position; and four, those that involve the judge in frequent transactions with lawyers or persons likely to come before the court.

I think that Judge Nixon's dealings with Ingram, Mr. Fairchild's lawyer, fall under two and perhaps three of those standards: The first, the third, and perhaps the fourth. The first, those that adversely reflect on the judge's impartiality, because he is seeking, he sought a big favor from a lawyer who practices before him and because he sought an investment with Fairchild or Fairchild Construction Co., he negotiated with Fairchild and made a deal with Fairchild Construction while it was a party in two cases before him. I think that adversely reflects on the judge's impartiality.

I think it also exploited his judicial position because as a judge, he was asking a man he didn't know to give him a special deal by finding and then selling him a piece of an investment, and then later in February or March 1980 he learned that Fairchild had done the same thing for the Mississippi Governor and the Hattiesburg mayor. I think that suggests, if it hadn't before, that Mr. Fairchild did things for people in important positions, and indeed I believe Mr. Fairchild suggested that himself.

Whether there is a violation of the fourth prohibited kind of transaction I think is somewhat more problematic. Those are ones that involve the judge in frequent transactions with lawyers or persons likely to come before the court. I don't think, on the facts presented to me, that there is a frequent transaction with Mr. Ingram.

All we know is one. It is hard to know how to characterize the transaction with Mr. Fairchild.

There is only one deal, but the back and forth, there was a fair amount of it both in the negotiations and through the medium of the royalty payments through Fairchild Construction. I think reasonable people could differ on whether that should constitute a frequent transaction.

Having found a violation of the first and the third standard, I really didn't spend a lot of time trying to figure out whether the fourth one should be regarded as involving a frequent transaction or not, also because there is another even more explicit part of canon 5 that was violated, in my view, and that is canon 5C(4), the one that prohibits the judge from receiving a loan.

I would like to go through the language of that just a little more than has been done already. Canon 5C(4) does more than just prohibit a loan. It says that the judge should not accept a gift, favor or loan. I think all three were involved in this situation. There is a gift, I think, in the difference between the loan interest that was charged and the commercial lending rate that was being charged Judge Nixon if it is fair of me to infer from the facts that have been given to me that the 10-percent loan was a favor in that the going rate was 15 at that time. If that is right, then there is a gift of 5 percent interest.

I think there is certainly a favor involved here as well by both Mr. Ingram and Fairchild Construction Co., and there is clearly a loan.

Now, the two other provisions of 5C that are involved have been referred to: A loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges. That is permitted. Professor Hazard in his letter suggests that in a general kind of way what was done here by Fairchild Construction ought to be looked at as a reasonable and ordinary commercial arrangement and thus complies with subsection (b). I don't agree with that.

Subsection (b) is quite specific. It talks about a lending institution in its regular course of business on the same terms generally available to persons who are not judges. On the facts as they have been given to me, Fairchild Construction Co. is not a lending institution and this was not a loan in the regular course of business from a bank or some kind of institution that gives loans.

So far as the facts that are available to me, this is a business in the construction company and loans were perhaps made to a few special people, but I don't see that that falls within subsection (b).

Then finally, any other gift, favor or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge. That seems to me clearly to cover the loan from Fairchild Construction, less clearly to cover the transaction with Mr. Ingram, the lawyer.

Mr. **Baron**. May I interrupt you for a moment?

Mr. **Kaufman**. Yes.

Mr. **Baron**. When you say that seems to cover it, that is you believe it to be a violation of the subsection?

Mr. **Kaufman**. Yes. Excuse me. That because of the fact that the interests of Fairchild Construction have come before the judge. I guess for purposes of my consideration, the crucial date for me is the date in 1979 after Judge Nixon has gone to Mr. Ingram, and at least by the summer of 1979 when Judge Nixon has heard in return that Mr. Fairchild would be delighted to look for a mineral interest in which Judge Nixon could invest. No loan, it is true, has taken place, then, but a favor has already been done once the negotiations get to that stage. So the crucial date for me is the summer of 1979, and at that time the *Boam* case is still going on.

I digressed a moment. I think it is not clear whether Mr. Ingram can be described as a person whose interests have come or are likely to come before the judge. That seems more ambiguous. In a way, you could say that Mr. Ingram's interests are likely to come before the judge in the sense that often a judge has to pass on a lawyer's fee, and in that way his interests could be said to be likely to come before the judge.

The other interests are the interests of the clients. That seems more remote when we are talking about this particular subdivision.

Thus, when we talk about canon 5, which just deals with prohibited acts and not with the question of recusal, it seems to me that Judge Nixon's dealings both with Mr. Ingram and with Fairchild Construction have violated two parts of canon 5. Maybe I should pause there before going on to canon 3 to see whether you have any further questions.

Mr. BARON. No, that is all. Go ahead.

Mr. KAUFMAN. The next question, then, is the question of recusal under canon 3. Excuse me while I find that. This thick book, by the way, that I am using here today is not the most convenient to use. This is a copy of the book that is provided by the Administrative Office of the United States to every Federal judge. It contains not only the Code of Conduct for U.S. judges but all the advisory opinions of the Federal Advisory Committee on Judicial Conduct plus the relevant statutory materials, plus a little history of development of the Code of Conduct, plus a series of resolutions passed by the Judicial Conference that relate to questions of judicial ethics.

Canon 3C and 3C(1) and section 455(a), which we have heard before discussed at great length, seem to me to have required recusal in this case. Indeed, I think that if my conclusion that the judge's actions violated canon 5 is accurate, then since canon 5 is aimed at prohibiting a judge from engaging in financial activities that might interfere with the impartial performance of his judicial duties, then when a matter involving the party with whom the judge has had the prohibited transaction comes before the court, it seems to me the paradigm case for finding a violation of both 3C(1) and 455A, which referred to the necessity to disqualify in a proceeding in which the judge's impartiality might reasonably be questioned.

Mr. BARON. When you refer to a proceeding in which his impartiality might be questioned, are you referring to one or both of the two civil matters in which Fairchild Construction had a role as a party?

Mr. KAUFMAN. I am referring to both. The critical question for me is the time when there is the conjunction of the prohibited act and the sitting on the case. In *Boam*, that is in 1975, as I said before, at least by the summertime when Judge Nixon learned that

Mr. Fairchild had said that he would be delighted to put Judge Nixon into mineral interests.

Mr. BARON. I'm sorry. I think you said 1975. Did you mean——

Mr. KAUFMAN. 1979. The summer of 1979. At that time the *Boam* case is going on, and subsequent to that there are some motions handled, a summary judgment motion denied by Judge Nixon, and the settlement agreement signed. But it is immaterial to me exactly what happens after the summer of 1979. As long as the case is still going on and is assigned to Judge Nixon, it seems to me that that is the moment when action should be taken. We really don't have to look to what happens later.

What happens later is relevant insofar as the magnitude of the seriousness of the violation is regarded, but the question I was asked was should he have recused himself and when? It seems to me the answer is yes, and the when is the summer of 1979 in the *Boam* case because that is when he had, it seems to me, already received the kind of favor that suggests that a reasonable person might fear that the judge's impartiality has become compromised.

Mr. BARON. Is it fair to say on the basis of what you have just stated that it really doesn't matter for purposes of your analysis as to whether recusal should have taken place whether it would appear that any of the judge's actions in the case subsequently might have favored Fairchild or any other party?

Mr. KAUFMAN. I think that both the statute and the canons were written as they are to avoid us from having to answer that question, or at least for judges themselves and parties moving for recusal to have to prove something as delicate as that. Indeed, I think what happened in this case shows the difficulty of it and the difficulty in to which lawyers may be put when asked after the fact did the judge show any favoritism to you.

If we are not thinking about an impeachment hearing, if we are just thinking about a recusal question and you are a lawyer having to practice before a judge, having to answer that question is fraught with all kinds of danger, and a lawyer is put in a very difficult spot having to answer that question. I think the purpose of the recusal rule is to say to the judge, no, you have got to decide and you have got to take action.

It is hard enough in those situations where a waiver is allowed to put the lawyers in a position where before any actions have been taken by the judge, to decide if they are going to let the judge sit; but after the fact, it is very hard for the lawyer to say yes, the judge's actions were partial one way or the other when you know you are going to appear before that judge again and again and again.

The second case is *Seymour*, and the critical time in *Seymour* is in the spring of 1980 when the case was assigned to Judge Nixon. So I think at that point we are further along. The negotiations have proceeded to the point where Judge Nixon already thinks he has a deal, although the deeds haven't been signed, and I think that canon 3 then clearly requires the Judge to recuse himself.

I have looked at the subsections of canon 3, the specific instances pointed out in canon C(1) (a), (b) and (c), the additional circumstances beyond the appearance where the judge's impartiality might reasonably be questioned section, which is a kind of a subdivision of canon C(1) in the Code of Conduct, and in the statute is a separate section, 455(b). I have some difference with Professor Lubet on the applicability of those sections.

I don't think any of the specific sections apply. The personal bias or prejudice, conceivably you might find personal basis for a party with respect to a case. I don't see enough in this case that suggests that. My principal disagreement is with his view on (c). I find it hard to say that Judge Nixon had a financial interest in the subject matter in controversy. I think it pretty clear that he didn't in either one of those cases. Those cases involved claims by Fairchild Construction for payment on a debt having nothing to do with the mineral leases here or with an injury, nothing to do with the mineral leases here.

The real part is the second part, that he has a financial interest in a party to the proceeding or any other interest that could be substantially affected by the outcome of the proceeding. Financial interest is defined as ownership of a legal or equitable interest or other active participant in the affairs of a party.

Well, the party is Fairchild Construction, and I don't see how having purchased a mineral lease from Fairchild Construction, even if they both have interests in that lease and even if Fairchild Construction has some operating responsibility, and even if it had some fiduciary responsibility to Judge Nixon in connection with an operating responsibility, I don't see how that gives Judge Nixon a financial interest in Fairchild Construction either by way of legal or equitable interest or by his being an active participant in the affairs of Fairchild Construction. On the facts as they are given to me, he wasn't.

Mr. BARON. Mr. Kaufman, is it fair to say that although you disagree with Professor Lubet as to the application of those particular subsections, he reached the conclusion that Judge Nixon had an obligation to recuse himself from both of those civil cases. Do you differ with that conclusion?

Mr. KAUFMAN. I don't differ with that at all. I think the combination of the violation of 5C (1) and (4) and canon 3C(1) required recusal, and I have a clear view on that.

Mr. BARON. Did you address other questions in your review of this material?

Mr. KAUFMAN. The last question you asked me related to the conversation between Judge Nixon and Mr. Holmes, the State prosecutor. I think there was a violation of canon 2B. canon 2B is headed "A judge should avoid impropriety and the appearance of impropriety in all of the judge's activities." That gives the rationale for the specific prohibition in 2B that a judge should not lend the prestige of the judicial office to advance the private interests of others. Let me say one word about that.

It is clear to me that that is a fairly broad prohibition and it could be read and used to reach nonsensical results. Judges do act in society in ways that literally advance the private interests of others. Judges stay at hotels and choose to stay at hotels and give money to hotels while they are on judicial business. I do not think that that particular sentence can be read in a way that literally reaches everything a judge does or a judge will sit in his home all day long and not do anything and have any relations with any private business interests at all.

Mr. **Baron**. And probably not pay his electric bills, either.

Mr. **Kaufman**. That is right. I think it has to be read sensibly to relate to the judge's activities as they relate to matters within the judicial sphere that the judge is operating in. But here this was a case that was a drug bust. Federal authorities were involved. While there were no Federal charges pending at the time of the conversations either in 1982 or 1983, the U.S. attorney in Mississippi was already involved in this case, and a memorandum of understanding had been reached between the U.S. attorney and Drew Fairchild in late 1980 or early 1981 for providing for Drew Fairchild's cooperation with the Federal authorities in connection with a proceeding against the pilot of the plane, and a plea of guilty to charges that would be presented, and a recommendation of a 5-year probation had already been agreed upon.

It seems to me that for a Federal judge in the same district to say to the State prosecutor who had secured a state indictment of Drew Fairchild on the same incident involved in the memorandum of understanding with the U.S. attorney that the defendant's father thought that the state prosecutor was being blackmailed seems to me is to use the prestige of his office to aid the Fairchilds, father, and son.

Mr. **Baron**. Professor Kaufman, I think you may have misspoken about the characterization of the blackmail. What is your understanding of what was the allegation by Wiley Fairchild?

Mr. **Kaufman**. My understanding is that Wiley Fairchild thought that he, Wiley Fairchild, was being blackmailed.

Mr. **Baron**. I thought that was what you meant to say. It didn't come out that way.

Mr. **Kaufman**. I hope I didn't say that the prosecutor was being blackmailed. Excuse me.

Mr. **Baron**. I think you did.

Mr. **Kaufman**. I did not mean to say that. That he, Wiley Fairchild, was being blackmailed and that the good name of the Fairchilds was being dragged through the dirt.

Mr. **Baron**. Right.

Mr. **Kaufman**. The judge was talking about a case in which both the State and Federal prosecutors in his district had an interest, and when that happens, it seems to me that you can't say that that was a conversation just between friends because he is a Federal judge in Mississippi and that prosecution is going on or will be going on, at least the memorandum of understanding relates to a matter that is within his jurisdiction. Since canon 2 is headed not only as to impropriety but appearance of impropriety, I think that a judge who has that kind of conversation can't avoid at least an appearance of impropriety in suggesting that the State prosecutor—well, in passing on that kind of statement. Let's put it that way.

The facts as they were presented to me say that Wiley Fairchild didn't ask the judge to say anything to Mr. Holmes but he hoped that he would, and that Judge Nixon didn't hear Mr. Fairchild say that he wanted him to speak to Mr. Holmes but he got the impression that he wanted him to. It seems to me that at least from appearances sake, Mr. Holmes could reasonably infer that the reason the statement was being made to him by Judge Nixon that Mr. Fairchild thought he was being blackmailed related to some action that Mr. Holmes might take.

Now, there is some disagreement in the testimony there. Mr. Holmes' testimony goes on to say that in fact in part he did take some action based on that conversation and that he told Mr. Fairchild that he was doing it based on what Judge Nixon said.

Mr. **Baron**. But does that affect your conclusion about the impropriety of Judge Nixon's action?

Mr. **Kaufman**. It does not affect my view about the propriety of Judge Nixon's action because at the least, it seems to me, it strongly smacks of appearance of impropriety simply to pass on the comment that Wiley Fairchild thought he was being blackmailed.

I might add that in my own jurisdiction in Massachusetts a judge was censured by the Supreme Judicial Court for doing rather less than that. Judge Morrissey, who was once appointed to be a Federal district judge but was not confirmed, Judge Morrissey sitting as a State judge simply inquired of the U.S. attorney whether the SEC had filed a criminal complaint against a personal friend of his. The Supreme Judicial Court said that State judges are not supposed to do that, that that is a violation of the Code of Conduct.

Mr. **Baron**. Although the inquiry related to Federal action and the inquiry was by a State judge.

Mr. **Kaufman**. That is why I say that Judge Morrissey did far less, and they say he wasn't attempting to influence, he wasn't attempting to do a favor, but State judges simply are not supposed to make that kind of inquiry.

Mr. **Baron**. Do you agree with that conclusion based on your own mind?

Mr. **Kaufman**. Yes, I do, but I think the appearance is much stronger in this case which involves a matter that falls within the Federal judge's own jurisdiction.

Mr. **Baron**. Let me ask you this. Mr. Stewart in his papers makes certain contentions regarding the transactions with Wiley Fairchild and Fairchild Construction. He suggests at one point that this really didn't amount to a financial interest, that it was something akin to the purchase of an asset like an automobile.

First of all, do you agree with that assessment? Second, have you found any cases which bear on the kind of transaction that Mr. Stewart is trying to label this one?

Mr. **Kaufman**. No, I don't agree with that. This is not like a case where you walk into an automobile dealership and buy a stock item off the shelf and walk out again. This is a case where there was no stock item. Judge Nixon through his friend, Mr. Ingram, sought out Mr. Fairchild, whom he did not know, to do a favor for him, to find him a good deal that would make him money on a special basis, and it was done on a special basis.

There was, on the facts presented to me, kind of a continuing relationship over a long period of time while this whole deal was played out through a long period of negotiations and the a period of payout of the royalty, culminating in the conversation with Mr. Holmes. And indeed, even in the automobile case there is a case involving a Wisconsin judge who was found to have violated the

Wisconsin Code of Conduct, which is not the ABA's Code of Judicial Conduct, but it proscribes gifts in the same way as the Code of Conduct we are dealing with proscribes gifts.

The judge made a deal with an automobile dealership for favorable rental of cars for 12 years, and during this period he sat on cases involving the automobile dealership, two cases, and the court said that was wholly improper. So even if you are dealing with a standard item kind of situation, if you get favorable treatment with respect to it you can't sit on cases involving the party that gave you favorable treatment.

Mr. **Baron**. Is that the *Seraphim* case that you pointed out to me when we met to discuss this matter?

Mr. **Kaufman**. Yes. This is a case from the Supreme Court of Wisconsin.

Mr. **Baron**. Going back to Judge Nixon's activities relative to the two civil cases, does it make any difference in your conclusions that you have already testified to that those cases were settled, that they were not tried, and that Judge Nixon's role in those cases was relatively limited? Does that affect your conclusions?

Mr. **Kaufman**. It does not affect my conclusion with respect to recusal because I think that the time for recusal in the *Seymour* case was the moment that case was assigned to him, and the time for recusal in the *Boam* case, which was ongoing when he undertook negotiations with Fairchild, the time for recusal was the time when those negotiations had proceeded at least to the point where he knew that Mr. Fairchild was willing to do business with him.

Mr. **Baron**. Does the fact that Judge Nixon apparently had a heavy caseload in his district in any way diminish his responsibility for failing to recuse himself for failing to disclose whatever interest he had?

Mr. **Kaufman**. I think the whole purpose of the rules and the changes in rules in 1973 were to impose an obligation on judges to comply, and part of that obligation is to be fully aware and not just of the judge's own personal financial interests. That is one side of the equation, but the other side of the equation is the other part of the conflict, namely, the parties who are appearing before him.

Mr. **Baron**. The fact that Fairchild might be characterized as a minimal or peripheral party, does that in any way diminish Judge Nixon's responsibility to recuse himself or change any of your conclusions concerning these matters?

Mr. **Kaufman**. I would say two things about that. One is I don't think Fairchild Construction was a minimal or peripheral party. In the *Boam* case it was seeking a recovery of $17,000, which it eventually got. In the *Seymour* case, while the insurance company was in there, I would say it was not a peripheral party for two reasons. One is the insurance company was only in there up to the limit of its policy, which was $500,000.

If this case went to trial and a verdict were returned for the plaintiff in excess of $500,000, that could have come out of Fairchild Construction's own pocket. But even if the insurance company was in there for the full amount, I think all of us who carry insurance know that we are in there as real parties, and if there are findings that we did something wrong or that there is liability for some reason or other, those are findings against us as defendants and that has an impact on us, and it may have quite a practical impact on our future insurance rates.

So I don't think it is right to say that they were peripheral parties. Could you put me a case where a party was such a nominal defendant that it had no real interest at all? I suppose you could, but I don't think this is that case, by a long shot.

Mr. **Baron**. Finally, I believe it was in Professor Hazard's memorandum he suggests that it might be possible to have a different standard of conduct under the code, depending on whether the setting was a rural one or an urban setting. Do you accept that distinction?

Mr. **Kaufman**. This is a distinction that I often see people talk about in connection with lawyers, where it has certainly come up a lot. There is not one law for lawyers in Jackson or New Orleans and another for lawyers in Hattiesburg, and there isn't one for judges either. The decision has been made to have these rules apply across the board to all Federal judges, and that is the way they are written and it seems to me that is the way they should be applied.

Mr. **Baron**. Thank you.

I have no further questions.

Mr. **Edwards**. Mr. James.

Mr. **James**. Is there any distinction in these canons of ethics as to which are more important, one as to the other?

Mr. **Kaufman**. Of the ones I have talked about?

Mr. **James**. No, any one of them listed here. Do they have any gradations, any penalties or forfeitures as associated with any mandate within the canons?

Mr. **Kaufman**. No.

Mr. **James**. Do you think most Federal judges and State judges adhere to these?

Mr. **Kaufman**. If you are asking me whether I have done any empirical research on that, the answer is no.

Mr. **James**. Within your experience, do you think most State judges——

Mr. **Kaufman**. My experience with judges that I know and have talked to about these issues is that they try their hardest to adhere to them, but one isn't said to be more important than the other, by the writings, at least, within the canons.

Mr. **James**. No? What about canon 3, subparagraph 3, where it says a judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom he deals in his official capacity and should require similar conduct of lawyers of his staff, court officials. How many times have you seen every circuit judge you have ever known and all Federal judges to have at least violated that at least one time a day during litigation? How many times?

Mr. **Kaufman**. I have certainly seen that one violated, but you asked me if I thought it was important that it not be violated.

Mr. **James**. I didn't ask you that at all.

Mr. **Kaufman**. Oh, I thought you said were some more important than others.

Mr. **James**. I did ask you that. Is one more important than others as in the writings? I am not asking your opinion as to which one is more important than others. I am asking you does this canon of ethics make a distinction between one mandate as opposed to another?

Mr. **Kaufman**. Not in terms, no.

Mr. **James**. In other words, when it goes before an ethics committee, it is rather arbitrary or capricious as to what canon is more important as one as opposed to the other, is it not?

Mr. **Kaufman**. Oh, I don't think it is arbitrary or capricious at all. I think somebody charged with the responsibility of sitting in judgment is going to—we are all human beings and we are going to regard lying and cheating and stealing more seriously than being impatient, and we should.

Mr. **James**. Where does it say that, though? Maybe I shouldn't say arbitrary or capricious, but let's say subjective. Is that fair? It's a subjective consideration as opposed to objective. Is that such a hard question?

Mr. **Kaufman**. It is hard because the course of judicial decision and how courts treat violations is going to turn what you have said is subjective into objective. You have got to start somewhere, and as you build up a body of law—it's like the first judge who ever decided a case anywhere without any precedent at all made a subjective decision 700 years ago. But today, with a huge body of common law precedence, judges are much more constrained. I think we are in the process now, with a much greater attention being paid to questions of judicial ethics, of building up that body of precedent which will constrain the subjectivity that you are talking about as we go along.

Mr. **James**. Indeed, then, if you want to deal with precedent, wherein has a judge ever been impeached because of a breach of ethics per se as opposed to criminal acts? Do you know a case, a Federal judge?

Mr. **Kaufman**. If I had been asked, I would have reviewed the history of Federal impeachment of judges since the early 19th century, but I believe there are a number of impeachments of judges in which the specifications upon which they have been convicted have involved violations of ethics.

Mr. **James**. Any one that is close to this factual situation? That is what I need to make a determination. Not for drunkenness or other type of obvious incapacity or insanity, but for anything that relates specifically to the kind of conduct of failure to disclose where there wasn't otherwise a criminal conviction. Do you have one? You don't know of any specific ones by name?

Mr. **Kaufman**. I remember Justice Chase of the Supreme Court, but of course he was barely acquitted, so that won't help you, but intemperate conduct, actually articles of impeachment were voted by the House of Judge Chase for intemperate grand jury speeches.

Mr. **James**. We are not dealing with drunkenness here.

Mr. **Kaufman**. No, no, not drunkenness. I meant intemperate, violent, abusive——

Mr. **James**. Oh, abusive.

Mr. **Kaufman**. Partisan, politically partisan.

Mr. **James**. Which we are not dealing with here either. In fact, there is no evidence whatsoever that there was any improper ruling.

Mr. **Kaufman**. But that is an ethical, clearly ethical violation.

Mr. **James**. It is ethical but it also could be described as a misdemeanor in office, misconduct in office that makes him unfit in that case, disassociated with a pure ethical violation such as failure to— well, it's hard to make the distinction, but some substantive conduct. It could be all of three things. It could be an ethical violation, it could be a criminal violation, and it could be evidence or indicia that you are incompetent or incapable of functioning on the bench. So there are really basically three classifications, all three of which could be covered by ethical.

I am talking more about the type of cases as failure to disqualify, for example, failure to disclose, grounds for disqualification, any of those that fall within the classification of the facts that we have here.

Mr. **Kaufman**. I have not reviewed the history of the impeachment of Federal judges.

Mr. **James**. I have asked our attorneys to give me a list of every situation they have and I think they have assured me there are some cases that involve at least ethical violations and I will look for them and ask them to point out to me the ones that are closely associated with this particular case if you don't have them. I was just curious.

The problem I really have and I am trying to point up is that I always had trouble specifically with interpreting the rules for judges as to gradations of importance because there is not corresponding penalty associated with a violation. Of course, most judges may try to do these things, for example to be courteous, et cetera. No one is perfect in that area, no matter how genteel the judge might be and yet you don't see that brought or punishments being brought forth for it.

On the other hand, you do see punishments in some of these categories, as you say that we all know instinctively are more severe but the problem that I have with it—we're not dealing with a violation of ethics per se for a group of judges to sit in judgment on another or with even your assistance as a layman as you do in state court where you can mete out some kind of—we are dealing with whether or not the man should be removed from office without the allowance of gradations of right and wrong. We can't use the Hammurabi Code or the Bible or the Golden Rule or the Florida statutes or the Nebraska statutes, so what I want to ask you is what is the relevance then indeed if we find that there is a breach of ethics. How do we relate and translate that to the language of misdemeanor in office considering the history of what that word in fact means.

How do we relate it? How do we connect it and indeed how do you connect it?

Mr. **Kaufman**. Well, I think the way I would connect it would involve a factual inquiry that I am not in a position to make. If I thought the conduct that I have described was intentional, if I thought that with respect to each one of these incidents there was intentional concealment, if I thought with respect to the Drew Fairchild prosecution that there was an intentional effort to interfere with the course of justice in that case then I could answer your question about would I regard this as very seriously as possibly falling within the area of impeachable conduct.

Mr. JAMES. Well, I think we would all agree if there was clearer evidence that it was an intentional motive, if there was other than just a technical violation of the code or a substantial violation of the code, if there was an intentional manipulation of the circumstances of a given case with an obtuse judgment rendered or an effect brought about and it was clear to us that we had the smoking gun that but for this relationship one man would have received *x* amount of dollars as opposed to the other, then we might all agree that was—we would have no real problem that would be a misconduct in office that may in and of itself entitle to an article of impeachment.

Barring that consideration you would agree with me, or you would say then it becomes a harder call as to whether or not it would fall with the kind of misconduct that would demand in articles of impeachment.

Mr. KAUFMAN. I am reluctant to trench on your responsibility with respect to——

Mr. JAMES. Well, indeed you have entrenched on the issue of whether it was unethical. I am only asking you to go one step further and tell me if that conduct, if that conduct in fact is such that in your opinion would be misconduct that's tantamount to a misdemeanor in office that would demand an article of impeachment.

Mr. KAUFMAN. If you are asking me——

Mr. JAMES. I am asking you what I asked you, not that you would rephrase, OK?

Mr. KAUFMAN. For what it's worth, for what it's worth, without some degree of knowing violation, I would not regard it that seriously.

Mr. JAMES. OK, so you would not feel uncomfortable then if in fact on the ethical violations you have testified about, not the lying, but the ethical violations you found if this committee suggested there be no articles of impeachment on those ethical violations, you wouldn't find that so abhorrent to your sense or justice or law or ethics, is that correct?

Mr. KAUFMAN. If you concluded that the ethical violations were not committed knowingly, and we can argue about what I would include within knowingly.

We can argue about what I would include within knowingly.

Mr. JAMES. All right, what does knowingly mean—because we heard an earlier discussion of knowingly——

Mr. KAUFMAN. Yes.

Mr. JAMES [continuing]. By the other witness.

Mr. KAUFMAN. Yes.

Mr. JAMES [continuing]. And knowing it was a breach was——

Mr. KAUFMAN. Right.

Mr. JAMES [continuing]. His distinction was yes, of course he knew he was doing these specific acts but he didn't know it was tantamount to a breach of the code of ethics.

Are you using the same distinction?

Mr. KAUFMAN. As I recall his distinction, I am using the same distinction, yes.

Mr. **James**. OK, so if he knowingly did, knew that he was breaching the code then you would think that itself would be elevated to the status to bring an article of impeachment?

Mr. **Kaufman**. I'd consider it seriously. Before I answered that question I would want to do some more work on the history of impeachments which I have not done.

Mr. **James**. I see, so even if he knowingly breached it in this factual situation you are not sure whether or not that would justify or elevate it to the status of misconduct in office or misdemeanor in office that would bring forth an article of impeachment.

Mr. **Kaufman**. I haven't considered that question.

Mr. **James**. You are just telling us what is unethical.

Mr. **Kaufman**. Yes.

Mr. **James**. And it is just as unethical as far as these rules are concerned to be rude to a lawyer, a litigant as far as rules are concerned.

Mr. **Kaufman**. They are equally violations of the rules. They are not just as unethical; some are much more serious in my view than others.

Mr. **James**. That's interesting. How do you determine whether something is more unethical or not when I have a litany of things that are in fact unethical with no grades?

Mr. **Kaufman**. Because as I have studied the subject it is clear to me that courts and disciplinary authorities all over the country have imposed different kinds of punishment for different kinds of violation in ways that seem to me to be quite sensible.

Mr. **James**. But that's all you can say about it? It depends on the court, the judge, et cetera. Likewise you have seen dismissals or you've seen reprimands in some cases and, well, what have you seen basically for these violations? Removal from office in any of these cases that you have testified about with this degree of severity? Have you found any of those for Federal judges? Removal?

Mr. **Kaufman**. Of Federal judges? No.

Mr. **James**. State judges for this? Have you seen a removal for just one of these type of instances?

Mr. **Kaufman**. Part of my problem in answering your question here is I don't have a full factual picture of this case. I have not reviewed——

Mr. **James**. I am just asking you about the facts you have testified to. Forget the other facts. From just the ones you know about, is there any case you could point to even on the State level that was extremely similar in regard to the amounts of potential conflicts of interest, et cetera, that we could use as a barometer?

Mr. **Kaufman**. I know of no case of removal of a judge for conduct of the sort that I have testified to without further findings as to the state of knowledge of the judge with respect to those violations.

Mr. **James**. What I am trying to do in my mind is to decide whether or not I should consider ethical violations of this nature, in its cumulative nature, when I turn around and try to consider very serious allegations of the commission and conviction of a crime.

In other words, I am not convinced in my mind I should even toy with worrying myself about whether or not we have ethical violations in regard to recusement, et cetera, which may very well bring forth a reprimand or suspension in the State court system or the Federal court system, but leave that to the ethic consideration of the judges, et cetera, and look at these rules, and if that be the case then I hesitate to use that again and again after the ethics people have finished with it to decide whether or not he is to be removed, a very severe sanction that I don't think any of these allegations by themselves would do.

I do believe that perjury may well be a misdeed in office perhaps that would allow removal, so I am trying to see what rationale I can use to use this kind of ethical violations cumulatively with other allegations if these themselves don't reach that level.

Mr. KAUFMAN. All I can say to you with respect to their cumulative effect in my opinion is that they would have more or less relevance to a judgment about their cumulative effect as you make judgments more or less relating to the state of knowledge with which the ethical violations were committed.

Mr. JAMES. Then if indeed they have a cumulative value for the purposes of determining impeachment, would not then we be required to examine the man's entire life record cumulatively to see his proper handling and his ethical consideration of all other cases?

In other words, what's good for the goose is good for the gander if we are going to examine these isolated events. Indeed, are we not then required to look at the quantitative and qualitative exercises of his judicial functions in other areas and hear extensive testimony from people who—and attorneys who have been before him?

Do you follow what I am saying?

Mr. KAUFMAN. Well, all I can say is that I would assume that in other impeachment cases it was urged on this body and on the Senate that the officer being impeached had performed well over a wide range of conduct in office and that that should be taken into account.

I assume arguments like that are made all the time and the question is for the trier of the facts, simply how much evidence of that sort you are going to allow in.

Mr. JAMES. Well, OK. This is my last question or statement. I just don't want to consider 100 to 200 jaywalking violations and I am not saying these are jaywalking but in a murder case cumulatively, do you follow what I'm saying, where it is attempted murder I may very well consider as a sentencing judge in a murder case so that's why I was trying to grade out these things and there are no grades that the ethics committee's ever assessed for these things.

It is a matter of many subjective factors as to what happens with any ethics committee or in any State and before any tribunal, so I am trying to grade out or see if I should grade them out and I am not convinced that I should.

In other words, maybe I should use them cumulatively but maybe I shouldn't and I use that only to point out there are certain things in the ethics code that says hey, you should be a very pleasant person, and obviously unless that happens repeatedly and every day, you won't even have a censorship of that.

Mr. KAUFMAN. Well, I would hope not.

Mr. JAMES. OK, but can you help me in the problem I will have before me? Do you understand the nature and the magnitude of our problem? Is there any instruction you can give me ethically that will help me assess it?

Mr. **Kaufman**. All I can repeat is that were I sitting in your chair with respect to the matters about which I have testified this morning, I would want to draw a judgment about the state of mind with which—whatever inferences I could about the state of mind with which these violations were committed.

Mr. **James**. Thank you so much. I appreciate it.

Mr. **Kaufman**. You're welcome.

Mr. **Edwards**. I think—do you mean, Professor Kaufman, that if Judge Nixon just didn't notice that the name of Fairchild Construction was in any of these papers, I believe that is the testimony, the information we have from Mr. Stewart on that, is that what you mean by intention?

Mr. **Kaufman**. Yes.

Mr. **Edwards**. What do you think the Judicial Conference of the United States would do in a case like this, since, you know, they don't know about this. This is something that is our own lawyers have gathered——

Mr. **Kaufman**. It is hard for me to predict what a judicial body would do other than by what similar bodies in States that have much more—that have been involved much more in considering violations like this. I think in many States violations of this sort would result in disciplinary actions of some sort and the "some sort" would depend on kind of an assessment of the seriousness of the conduct and the degree of fault on the judge's part—for example, in not being aware.

The conversation with Mr. Holmes, that is not a lack of awareness situation. Some version or other of the facts would have to be credited and if the strongest version of the facts that was put to me was credited, the version of Mr. Holmes, I think that would be regarded fairly seriously in a great many jurisdictions.

Mr. **Edwards**. Thank you, Mr. Stewart.

Mr. **Stewart**. Good afternoon, Professor Kaufman.

Mr. **Kaufman**. Good afternoon.

Mr. **Stewart**. I just have a few questions here. You mentioned a couple of State court cases, and I wanted to fill out the record. One was the *Morrissey* case in Massachusetts. You apparently have the case there. I don't have my copy, but I did read it recently.

You mention that the judge involved had approached the SEC with respect to a possible investigation of a friend of his.

Mr. **Kaufman**. Approached the U.S. attorney, asking whether the SEC had filed a complaint. That was one of two things.

Mr. **Stewart**. That was the other thing. You didn't mention the other thing that he was disciplined for, which was that he received a $4,000 gift from that individual on whose behalf he approached the U.S. attorney.

Mr. **Kaufman**. That's true.

Mr. **Stewart**. OK, I just want to make sure that the subcommittee knew all the facts of that.

Mr. **Kaufman**. That's true, I was only referring to the fact that the court said that it was a violation of judicial conduct to have approached the U.S. attorney. It was also a violation to have taken a gift from someone—even someone who was not appearing in a matter before him.

Mr. **Stewart**. You also mentioned the *Scraphim* case in Wisconsin, which involved some many years of car rentals at a favored rate.

Mr. **Kaufman**. Yes.

Mr. **Stewart**. There were other violations in that case as well that you didn't mention.

Mr. **Kaufman**. Lot's of other violations.

Mr. **Stewart**. He had been abusive towards women, and his in-court conduct had shown prejudgment and unfairness of parties.

Mr. **Kaufman**. Correct.

Mr. **Stewart**. All right. In addition, I do have to ask this question. You're not aware of a single ruling or judgment or action by Judge Nixon that you point to and say, that was biased or favorable?

Mr. **Kaufman**. No.

Mr. **Stewart**. I have a couple other things. You mention that you do disagree with Professor Hazard's analysis of a couple of points on the loan and the conversations?

Mr. **Kaufman**. Yes.

Mr. **Stewart**. You've known him for a number of years, I take it?

Mr. **Kaufman**. He's an old friend of mine.

Mr. **Stewart**. You've disagreed with him on any number of ethical issues over the years?

Mr. **Kaufman**. Yes.

Mr. **Stewart**. You just had an exchange in the National Law Journal where you disagreed about a subject?

Mr. **Kaufman**. Correct.

Mr. **Stewart**. It was an ethical issue; is that right?

Mr. **Kaufman**. Yes, and I have a letter from him admitting that he might be wrong, although he said, for the first time.

Mr. **Stewart**. I'm sure the date was after our letter. You mention that it might be relevant to you—it would be relevant to you in determining the financial—excuse me, the possible violation in the conversation with Carroll Ingram—and correct me if I'm wrong—that Judge Nixon might rule on Carroll Ingram's fees?

Mr. **Kaufman**. Only when I was talking about violation under 5C(4). I think there was a violation under 5C(1) in the initial conversation.

Mr. **Stewart**. Now, this point on the fees, that's pretty speculative; isn't it? Do you know what kind of practice he has—Carroll Ingram?

Mr. **Kaufman**. No, I do not know.

Mr. **Stewart**. Do you know if his practice ordinarily involves applications for fees?

Mr. **Kaufman**. I do not know.

Mr. **Stewart**. Is that something you would want to know before you take that into account?

Mr. **Kaufman**. Yes.

Mr. **Stewart**. You also talked, when you were talking about this conversation with Bud Holmes, you mentioned that had been a previous memorandum of understanding concerning Drew Fairchild with the U.S. attorney, and that that Federal involvement was of particular significance. Can you point to any evidence that Judge Nixon knew of this prior Federal involvement at the time he had the conversation with Bud Holmes?

Mr. **Kaufman**. No.

Mr. **Stewart**. So, if he didn't know about that Federal involvement, then he could not be guided in his own decisions by that consideration; isn't that right?

Mr. **Kaufman**. Except insofar as a Federal judge might know that a drug case is at least potentially a Federal matter.

Mr. **Stewart**. All right, Mr. Chairman, I will resist the temptation to have Professor Kaufman disagree with Professor Lubet over and over again on the record, and simply will cease my questions.

Mr. **Edwards**. We have it on the record with Professor Hazard, so we're ahead.

Mr. **Stewart**. I have no further questions. Thank you, Professor.

Mr. **Edwards**. Thank you very much. Mr. Stewart, we can either break for a rather quick lunch, or you will be recognized now for your presentation. What would you prefer?

Mr. **Stewart**. I will convenience the subcommittee. I don't expect to have remarks of more than 15 or 20 minutes.

Mr. **Edwards**. Why don't we proceed then. You are an unsworn witness.

STATEMENT OF DAVID STEWART, ESQ.

Mr. **Stewart**. Mr. Chairman, I do appreciate this opportunity to speak today, and just as a procedural matter, I did want to first confirm what's in your written statement. We just didn't do it out loud today; that the materials that were submitted by us subsequent to the close of the hearings last July, are now to be accepted in the record as by request of my letter.

Mr. **Edwards**. Without objection, they are all made a part of the record.

Mr. **Stewart**. Thank you. One other matter, and it is both housekeeping and also quite substantive. It concerns a case I first learned about yesterday, and learned from Judge Nixon about it, in which he did recuse himself. It was a case that implicated the oil investments that are involved here in all of this proceeding.

I did not acquire a copy of it until I received it by telecopy at a quarter to five last night, at which time I immediately called impeachment counsel here and advised them of it and telecopied it over here. I've provided them with extra copies today. I'd like to describe this just for a second, and I will refer to it again.

The case was filed in October 1982. To place it in the time line, this is after the investment has been in place now for at least a year and a half, with written deeds, and at a time when the Drew Fairchild is still pending somewhere in the State court, and no action has been taken with regard to it.

A lawsuit was filed, and a request for emergency relief was included, which was a request for temporary restraining order on behalf of Transcontinental Gas Pipeline, which related to these two oil fields. One of the oil fields was a field in which Judge Nixon has a royalty interest in one of the wells. The matter came to him. It's reflected on the docket.

The materials I have today, and I have provided them to counsel, include the docket sheets for the case, and the complaint. I have not yet received his order, although there is a reference in the docket sheet to his order of October 28, in which he did recuse on the case. The case concerned the Green Creek Fields. In fact, when you look at the complaint, an attachment to the complaint is an order by the State Oil and Gas Board.

This was a dispute over the allocation of natural gas to various takers from this field—different pipeline companies, and the Fairchilds had participated in the administrative proceeding before the state agency. Although they were not named in this complaint, it appears that they subsequently did enter the lawsuit after Judge Nixon had recused himself.

I bring this to the subcommittee's attention, and I will ask that it be received, and I would have done it earlier. I apologize. I just—through miscommunication, I had not understood that this was a separate case—because I think it does go directly to the question of intent. Here was a case in exactly this time period where, for whatever reason and however the human mind works, Judge Nixon noticed—he caught the fact that the Fairchilds were—had an interest and that he had an interest potentially in this lawsuit, and he got out of it just as soon as he could.

I do think that that is directly material to the issues which I think Professor Kaufman has framed fairly well. I am going to confine my remarks only to what is going on here today, and not try to pick up anything else, unless the subcommittee wishes to ask me anything. I want to just state that had Judge Nixon noticed the Fairchilds presence in these two lawsuits, he would have recused himself or at least disclosed it—his investment. We do not contend that there was no basis for recusal, and do not contend that there was no obligation to disclose, had he noticed it.

Our point has been simply that he didn't make that connection. The issue—and I do think that Professor Kaufman framed it fairly well—is: why didn't he make that connection? There, I think you do have to look at questions like: What was he doing all day? How busy was he? How prominent was Fairchild in the case?

Some of the questioning here today has been directed to removing those questions, but I think when you get to the question before this subcommittee, those questions are directly relevant. We've submitted documents showing this: In 1982, Judge Nixon was carrying over a thousand cases on his active cases. He was carrying more than double the average caseload of any Federal district judge—the average caseload of Federal district judges.

He was very busy. He was terminating. His rate of termination of cases was above the national average for district judges. We're emphasizing this because I have some anxiety that there is—perhaps Congressman James was not here last year—that there is some impression that the Southern District of Mississippi consisted of a lot of sipping of whiskey and listening to Hank Williams records.

Judge Nixon was working through a very heavy calendar, very diligently all the time. This was a busy district and he had a lot of cases come across his desk every day. I do think that there is just this human factor here, and the Supreme Court has recognized it in the *Lil Jeberg* case. Professor has recognized it in his writings.

We do not argue, of course, that a judge should ignore disqualification, but only that there is nothing surprising or sinister when a judge misses a disqualification problem. Fairchild Construction was not the centerpiece of these two lawsuits. In the *Boam Co.* case, it was a $250,000 case, and they had an $18,000 claim for which they were an intervenor with eight other intervenors. It may have been more intervenors.

In *Seymour,* they were found very promptly not to have any liability. It was one of the earliest rulings in the cases. Although we do recognize that it would have been substantially easier for him to notice Fairchild's involvement in the *Seymour* case, we can't argue that it was impossible to notice it; simply that it is readily understandable that he didn't.

So, let's go to the next step which is; what is the ethical problem? First, let's take the conversation with Bud Holmes in canon 2-B. Professor Kaufman from Harvard says that it's a violation and Professor Lubet agrees. Professor Hazard says it's not a violation. We think, obviously, that Professor Hazard is correct. Judge Nixon and Bud Holmes had been friends for more than 20 years. The judicial office that he was involved in at the time had nothing to do with that conversation.

It was flatly irrelevant, but one of the points I'm going to make here a couple of times today is that when the experts disagree, I don't see how you can get impeached. It's kind of simple-minded, I know, but especially, for example, if Professor Kaufman disagrees with Professor Lubet, but surely if Professor Hazard who is a very eminent man in this field, disagrees, I don't see how Congress can stand up and say, my heavens, let's get that man off the bench.

It doesn't mean that it was a smart thing that was done. It doesn't mean that you go and say, do it again. It does mean that the constitutional separation of powers should not be impelled on the basis of this particular transaction and this particular violation, if it is a violation.

The second question is the loan itself. Mr. Hazard thinks the loan is all right. Mr. Kaufman and Mr. Lubet think it isn't. I don't want to revisit that issue, but I want to raise the same question again, though. If these gentlemen can't agree, how can he be impeached for it? There are two State court cases I would bring to your attention. One was matter of Morrissey, which Professor Kaufman did bring to your attention, where there was no impeachment.

The other is In re McDonough, which is a Minnesota case where there was a lengthy period in which a judge got forgiven overcharge fees, and they forgave $2,500 in interest at the bank and it went on for 10 or 12 years. The Minnesota Supreme Court said, you know, he shouldn't have done it; it was a violation, but we're not going to remove him for it. It's just not—there were extenuating circumstances, and it is not the sort of thing that requires removal.

On financial interests, though, I don't think it's quite that malleable. I really don't think the experts have demonstrated any financial here. Of course, Professor Kaufman agrees that there was no financial interest that required disqualification. I think Professor Lubet's analysis escapes me. The thought that the money going through Fairchild gave Judge Nixon an interest in the Fairchild business—it was purely an administrative convenience.

It is in the record that they attempted to have that arrangement changed. Fairchild didn't want to handle the money. Fairchild tried to get Getty and union to take on that responsibility. They didn't want to do it either. So, he did it. It did not create a financial interest.

Now, we are sensible to the question; does it create an appearance problem, and I think that that's well taken, and I think I've conceded from the beginning here that, yes, we do think there was an appearance problem, and if Judge Nixon had noticed the appearance problem, he would have refused, but I don't think there was a financial interest. The other question on this working interest—I think if counsel will investigate it, and I suspect they may soon, they will discover that Fairchild Construction had a 3-percent working interest in these wells—in one of the wells, and they had a 1 percent working interest in the other wells.

He did not own those wells. Judge Nixon's royalty interest did not involve a financial interest in Fairchild Construction. Ninety-seven percent and 99 percent of those wells, respectively, was owned by other people. It is just too attenuated, too excruciatingly long a chain of causation for that to provide for a finding of an ethical violation. Finally, we do get to the question of appearance of impropriety in the failure to disclose and to recuse.

Here again, I return to this case that we have recently discovered, the *Transcontinental Gas Pipeline* case. The complaint in that case attacked, as I said, an administrative decision by the Mississippi Oil and Gas Board, I believe it is, and one of the fields involved, one of the wells Judge Nixon had an interest in, and he heard nothing in the case. As soon as he discovered the problem, he got out of it, and I do think that you can draw the inference that had he noticed the problem in the other cases, he would have done the same thing.

Here, I have to emphasize: look at what is at stake. In the *Boam* case, you've got $18,000 at stake. It is in the record that the Fairchild Construction Co. had oil holdings valued at between $20 and $25 million. They had net revenues—they had revenues in a bad year—that was Mr. Fairchild's testimony—in a bad year, his revenues were $5 million. This $18,000 claim would never even have come to the attention of Mr. Fairchild.

By the same token, if you look at the *Seymour* case, there was insurance. Under Mississippi law, and it is at the far end of the spectrum on this issue; under Mississippi law, the insurer has virtually no obligation to the insured in the conduct of the case. The insurer conducts the case and simply may not defraud the insured.

Again, these were not cases which involved severe liability—anything significantly at risk for the Fairchild Co. I almost had to put the argument this bluntly, but if Wiley Fairchild was going to go out and buy a judge, he wouldn't do it for these cases. That's just silly. He might. I don't know how many dollars were involved in this other case. Maybe this was a case he might get interested in.

Maybe an investigation will turn up that there were millions of dollar at issue in the *Transcontinental* case, but Judge Nixon recused himself from that case. I want to review a few of the extenuating circumstances we think are significant here. Just take each of the two case:

The *Boam Co.* case, as I have said, is by far the less material one that you could look at. The case was pending for over a year before Judge Nixon even spoke to Carroll Ingram. The case went to the magistrate by consent. Judge Nixon played no material part in it. Now, the magistrate's statement to the subcommittee staff, which was not provided by the subcommittee, but we did get it from the magistrate last week, does quite clearly say that Judge Nixon had nothing to do with the case once he got it.

I'm reading from page 9. "There was a period in there which on most cases, even though I may have had consent, I might have obtained the approval of a District Judge on the final judgment in a case, just because I was not sure of the state of the law." I'm skipping a passage, "* * * but the District Judge would play no role in that, other than simply to sign or approve what the Magistrate had already done."

Again, at page 64, he says, "* * * but the important thing to me, though, is what you're looking for here and dealing with is whether or not in this particular case, *Boam Co.* versus *Dependable Insurance,* Judge Nixon had any influence or had any decision making power regarding decisionmaking aspects to the case after I began the trial and began working with the settlements. My answer to that is, he did not, because I entered the case and I entered the decision." Excuse me, I misread that, "* * * I tried the case and I entered the decision."

I do think when you're trying to gauge the culpability, the injury to the system of justice, that that is relevant. It may not be relevant as to whether there is an academic violation of the cannon, but the question before this subcommittee and the Congress is squarely relevant. Mr. Keith did refer to the letter from one of the counsel in that case, Leonard Blackwell.

In that letter, he affirms, and this is a man who we have never spoken to—he says,

> I do not believe that justice was compromised in any respect, nor the integrity of the federal judicial process affected whatsoever by any prior dealings which Nixon may have had with W.R. Fairchild or W.R. Fairchild Construction. I guess what I am trying to convey to you is that the Boam case was one in which no action taken by Judge Nixon, as I remember it, affected the settlement result in any respect whatsoever. With the number of cases that were pending on Judge Nixon's docket at the time, it is doubtful in my opinion, that he even knew of the existence of this case, or of any involvement therein by the W.R. Fairchild Construction Company.

I really do think that it is readily understandable why Judge Nixon in the *Boam Co.* case would not notice. In the *Seymour* case, and I've been candid about this, there were more opportunities for him to notice the role of Fairchild and its presence there. I have to observe that plaintiff's counsel in that case, Mr. Owen, has submitted a statement that Judge Nixon showed no favoritism, and I don't think any could be found in the record. He did almost nothing in the case.

He signed an uncontested motion for summary judgment, and he granted—he denied cross motions for summary judgment on a contingent counterclaim by Brown Engineers, when Brown Engineers had been named in only nine causes of action in the complaint. It was an extraordinarily speculative cause of action to survive, but it did survive.

I think the role of the insurance also has to be considered. It did reduce any real liability for Fairchild. Certainly, after the summary judgment had been granted on the claims by the plaintiff, Fairchild was really in this case hanging by a thread. Again, this doesn't mean that he didn't notice it. It doesn't mean that he couldn't have disclosed, but I do think it means the impact on the system of justice was negligible. I also want to underline that no witness—and there's been no suggestion, but I do need to underline, because I'm nervous about it always—suggests that there was anything improper here.

Judge Nixon denies that there was any connection between his investment in these cases. Carroll Ingram has never suggested there was any connection between them, to his knowledge. Wiley Fairchild has never suggested that, and that's important. We know Mr. Fairchild lay awake nights trying to think up things to tell on Judge Nixon. He was trying to save his tail somehow, and if he'd thought of this, he might well have said it, but it didn't come to mind, because it wasn't there; it's not true.

So what is left in my judgment and in our view, is an investment that there was nothing wrong with; a loan that has been criticized, but in substance, we don't think was materially improper. We do have Judge Nixon's failure to note that Fairchild was in those cases, and that's it. I don't think there's anything in those facts that would render Judge Nixon unfit to hold judicial office.

We cited in our memorandum the 10 cases since 1976, I think, when judges have failed to disqualify themselves and should have. We found three more since then—one involving Chief Judge Fred Winner in Colorado; one involving Chief Judge Carl Rubin in Cincinnati; another involving Judge Don Young in Ohio. We don't think that these men need to be removed from the bench because they made a mistake.

We don't think Judge Nixon does either. I think the subcommittee has to have some perspective about this issue. We reviewed the records of the judicial conference for the disciplinary actions of the judicial councils under the Judicial Disability Act. We found no case where there was even public censure of a judge for failure to disqualify himself. There is no basis here for singling out Judge Nixon. We have other problems in this case, and we have addressed them, and I fear I have addressed at too great length for the patience of the subcommittee. This is just not a basis for impeachment. The claims of ethical lapses that have been presented here have the whiff or academic exercises, and I just don't think that this subcommittee can conclude that they provide a basis for the kind of encroachment from one branch of government to another.

The separation of powers has to mean something more than something like this where you can flyspeck a situation and figure out that there might have been a problem here, and that doesn't look quite right, and this doesn't look quite right. That's not what we require of Federal judges in order to retain their positions. Perhaps it should be reviewed by a disciplinary body.

Perhaps there would be a reprimand, and perhaps not—but not impeachment. That's all I have Mr. Chairman.

Mr. **Edwards**. Thank you very much, Mr. Stewart. Mr. James, do you have any questions?

Mr. **James**. You say you can't find any case on failure to recuse, where that in itself resulted in a censure, in any state court or federal court?

Mr. **Stewart**. None in Federal courts. In State courts, and I'm not a great student of this. I have to confess that what I've read is all the cases and all the articles by Professor Lubet that I was able to acquire. I have read all of those cases which may be 50 or 60.

I found none in which that was the only issue. I found none in which I really thought it was a very significant issue. The cases, in general, and candidly, the cases of removal tend to involve multiple misconduct of different types.

Mr. **James**. In any event, on any of these allegations—I'm talking about the ethical, not the perjury charges—on any of these allegations, is there any case law that you would like to submit or the absence thereof, where it is or is not grounds for misconduct in office, or a misdemeanor in office, and therefore a possible grounds for impeachment?

Mr. **Stewart**. Congressman James, I'm not aware of case law on that, but I would like, if the subcommittee would permit me, to reserve the opportunity to review what I have available to me, and also to look at the question you asked about other impeachments. I'm not a walking scholar on other impeachments, either.

Mr. **James**. I would like to see a bifurcated—I mean, I would like to see those things that are nothing more than perhaps ethical violations if it's only tantamount to misconduct that wouldn't rise to that level, separated away from the things that are clearly impeachable, for the simple reason that that's more in the nature of character testimony as far as I'm concerned——

Mr. **Stewart**. Yes, sir.

Mr. **James** [continuing]. Unless I can be demonstrated by my counsel to be different. I don't like this cumulative aspect of much lesser gradations of things. I want to look and see and have separated by argument, of your presentation and our counsel, those matters that we should not consider and those that we should, dealing specifically with the issues of whether it would be an impeachable offense.

Mr. **Stewart**. I would welcome the opportunity to address it in writing if you don't——

Mr. **James**. Yes. That's what I meant, in writing. Because anything this committee does has a great significance in relationship to this case as well as other cases it takes in the future.

Mr. **Stewart**. Certainly.

Mr. **James**. To make it clear as to—or at least how Congress approaches it, to make it clear that we're not interested in every ethical violation winding up at our doorstep. If it's an impeachable offense, we owe that to ourselves and to the public and we owe that to Judge Nixon, a clear demarcation of what issues we are considering.

Mr. **Stewart**. Thank you. Whatever schedule the subcommittee sets I'll meet.

Mr. **James**. Thank you.

Mr. **Edwards**. Special Counsel Keith has a question for the witness.

Mr. **Keith**. Thank you, Mr. Chairman. Mr. Stewart, as I understand from your oral argument today, you've conceded the fact that Judge Nixon should have recused himself from both cases?

Mr. **Stewart**. We think there was certainly—he certainly—had he noticed it, he should have disclosed, yes, sir, and we think it was a waivable—it was an appearance of impropriety issue, which was waivable by counsel. But had they chose not to waive it, recusal would have followed, yes.

Mr. **Keith**. I just want to clear that up, because in your written presentation to the members, you devoted roughly 15 to 20 pages of argument in connection with the issue of whether it was an ethical violation and whether he should have recused himself.

Mr. **Stewart**. I surely did, and I believe I devoted some time to it today. I don't think these are overwhelming ethical problems, and that was the thrust of my argument. I do believe in the memorandum. I also did say that there was surely a basis for disclosure and upon fuller and more mature reflection, we really have concluded that disclosure was appropriate and called for.

Mr. **Keith**. OK. I just want to find out where we stand, because you had mentioned in your pleadings that recusal was not required to avoid the appearance of impropriety. But now you are conceding that he should have recused——

Mr. **Stewart**. We are willing to accept that.

Mr. **Keith**. OK. I guess the second point that you've also conceded is that there is no question that Judge Nixon was aware of his ethical obligations and that had he noticed Fairchild's involvement in the two cases, that he would have recused himself?

Mr. **Stewart**. I feel certain he couldn't have spouted the Canon of Judicial Conduct if somebody had said please tell me canon 5(c)(4), but I do believe—we're not claiming that he was unaware of the Code of Judicial Conduct.

Mr. **Keith**. Your new case, for example, is a perfect example of a situation where Judge Nixon clearly realized that there was a conflict of interest and recused himself.

Mr. **Stewart**. Absolutely.

Mr. **Keith**. There have been other cases that have been cited; Judge Russell's affidavit cites a case. Judge Nixon the *GeoSouthern* case.

Mr. **Stewart**. Yes, sir; yes, sir.

Mr. **Keith**. So there's no real doubt here about Judge Nixon's awareness of his ethical responsibilities?

Mr. **Stewart**. You know, Mr. Keith, I can't tell you that Judge Nixon would have been able to say—I can't take a loan at *x* percent because that's below the market rate and that's what the Code of Judicial Conduct says. I don't think judges walk around with that kind of particularized notion.

But I do think of course he knew that if there was a party involved in the case that he had had some connection to, there was a problem. Yes sir.

Mr. **Keith**. So we're left with two possibilities here, isn't it fair to say? Either Judge Nixon did not notice Fairchild's involvement in the two cases, and it's simply an inadvertent mistake, and that's what you call an academic ethical violation, or he did notice Fairchild's involvement and deliberately chose to continue to be involved in the case. Aren't those the two possibilities?

Mr. **Stewart**. Yes, and I do think the second one is pretty farfetched. Why would a judge do that? Why would he do that? When he'd noticed it other times, he recused.

Mr. **Keith**. Well, if Judge Nixon saw the conflict but deliberately chose not to recuse himself to create the possibility of enhancing his business relationship with Wiley Fairchild, we have a real problem here, don't we? Because that's not an academic violation. That's a crime.

Mr. **Stewart**. I think it's utterly unsupported by the record or by any inference from the record.

Mr. **Keith**. Well, what we do know from the record and I don't want to recapitulate everything that was testified to last summer, but we do know that Judge Nixon was in dire need of additional income. Those were his words, "dire need." Fairchild provided him with an investment not available to the general public on favorable loan terms, and that Judge Nixon was grateful to Wiley Fairchild for that opportunity.

Mr. **Stewart**. I can't address each particular statement, but I'm willing to accept—I mean they sound about right, from the transcripts as I remember them.

Mr. **Keith**. I guess you've also conceded that there were many opportunities for Judge Nixon in the two cases to notice that Fairchild was involved?

Mr. **Stewart**. Not many in *Boam*. I do think in *Seymour* there were at least two or three, yes. Certainly when the summary judgment motion came before him, or both of them, absolutely.

Mr. **Keith**. So——

Mr. **Stewart**. It could have occurred to him.

Mr. **Keith**. So if we go through the two cases individually, in *Boam* we see that Judge Nixon was first involved in February 1979, when he enters those two judgments, the default judgments?

Mr. **Stewart**. Right. They didn't involve Fairchild. I mean you could look at the case for however long it takes to sign a default judgment and surely not notice Fairchild. I think you're stretching, Mr. Keith.

Mr. **Keith**. Well, I may be stretching, but Judge Nixon in his affidavit said that he saw the pleadings when he handled dispositive motions. Isn't that correct?

Mr. **Stewart**. Sure.

Mr. **Keith**. So we have—so the question is did he read the pleadings, and see that Fairchild was involved when he handled those motions in February 1979? You're suggesting that he didn't. I'm suggesting that he might have.

Mr. **Stewart**. But what did the pleadings say? They said *Boam Co.* v. *Dependable Insurance*, and it was a motion for default judgment by one party against another party, neither of whom was Fairchild.

Mr. **Keith**. On that particular issue.

Mr. **Stewart**. Right.

Mr. **Keith**. The question is when Judge Nixon in his affidavit said that the pleadings would be before him on dispositive motions, what I'm suggesting to you is that wasn't there then the first opportunity for Judge Nixon to see that Fairchild was involved in the case in front of him?

Mr. **Stewart**. Had he chosen to take the pleading file and read it through from start to finish at that time, absolutely. But if—I don't think judges do that, and I don't think any of us here does.

Mr. **Keith**. I guess you would say that it's simply a mere coincidence that the first time that Judge Nixon had substantive involvement in a case involving Fairchild is exactly the same time that he is going to Carroll Ingram and raising the possibility of investment with Fairchild?

Mr. **Stewart**. I don't believe that there's any connection at all, yes sir.

Mr. **Keith**. It's just a coincidental tie-in of dates?

Mr. **Stewart**. Sure.

Mr. **Keith**. Then in May 1979, we have a second opportunity along the same lines for Judge Nixon again to read the pleadings and see that Fairchild was involved, when he's handling dispositive motions?

Mr. **Stewart**. Right, if he is of a mind to go review the entire record.

Mr. **Keith**. That's right. Then in May 1979, on the 23d of May, when the summary judgment motion against Fairchild is filed, which Fairchild is actually a party to the motion, that would be a third opportunity?

Mr. **Stewart**. Right. Well, when it comes before him. It wouldn't come before him when it's filed.

Mr. **Keith**. Well, didn't you see the cover letter there, Mr. Stewart——

Mr. **Stewart**. I know.

Mr. **Keith** [continuing]. That indicated that it was copied to the judge?

Mr. **Stewart**. Ordinarily judges, and I'm just speaking from my own experience from clerking, but I mean if something comes in from a party, the judge doesn't rush out to their secretary's desk and read it. I mean it's usually put aside until the opposition comes in or it's scheduled for something, and then the judge will look at it, yes.

Mr. **Keith**. So that in reviewing those pleadings and signing that order involving Fairchild, that would be another opportunity to see that Fairchild was involved?

Mr. **Stewart**. Sure, and at that point he had not even an oral agreement. He had had exchanges. I really think you're barking up the wrong tree on the *Boam Co.* case. I mean I just don't think there's much there for you.

Mr. **Keith**. Well, the point is and I think Professor Kaufman made it very well, is that in the summer of 1979, Judge Nixon had learned that Mr. Fairchild would be delighted to enter into an investment with him, and at the same time he is signing a summary judgment order with Fairchild's name on it. Isn't that the case?

Mr. **Stewart**. That is the case.

Mr. **Keith**. Are you suggesting that he wouldn't know at that point in time that he is involved in negotiations with Fairchild?

Mr. **Stewart**. I think he would.

Mr. **Keith**. Then we have a hearing before Judge Nixon in June 1979, in which Fairchild's counsel is present, yet another opportunity for him to discover that Fairchild is involved? That's the hearing in which he refers it to the magistrate, the 10-minute hearing?

Mr. **Stewart**. Yes. I mean again, I just don't see the point in hanging a whole lot on that 10-minute hearing.

Mr. **Keith**. Then we have Judge Nixon signing orders in the case, again dispositive orders on June 8, 13, and 19, again all opportunities if Judge Nixon read the pleadings, to see that Fairchild was involved?

Mr. **Stewart**. Sure.

Mr. **Keith**. OK. The same would be true of the settlement papers? If he actually read the papers before he signed them, the settlement agreement itself, the disbursement order in October 1979, the order dismissing Fairchild from the case, again with Fairchild's name on all three of those pleadings——

Mr. **Stewart**. Absolutely, and Magistrate Roper makes it clear that ordinarily he doesn't expect the judges to read them before they sign them.

Mr. **Keith**. But again, if he did read what he was signing——

Mr. **Stewart**. Sure.

Mr. **Keith**. So that in the *Boam* case, unless my addition is wrong, we have 10 or 11 potential opportunities, including several involving Fairchild in particular and orders with Fairchild's name on them, where had Judge Nixon read what he was signing, he would have noticed the conflict?

Mr. **Stewart**. As I've made clear, I don't think it comes anywhere near 10 or 11 realistic opportunities, no.

Mr. **Keith**. We have the same problem in the *Seymour* case, isn't that right?

Mr. **Stewart**. I've addressed that, yes.

Mr. **Keith**. In the *Seymour* case, Fairchild's name is on almost every pleading, isn't it, the way——

Mr. **Stewart**. I believe that's right.

Mr. **Keith**. So that when we have Judge Nixon entering orders in June and July, again he's entering orders and signing orders that have Fairchild's name on it?

Mr. **Stewart**. Yes.

Mr. **Keith**. We know that Fairchild's name, of course, was on the summary judgment motion and the order that Judge Nixon signed?

Mr. **Stewart**. Yes.

Mr. **Keith**. We know that Judge Nixon had a conversation with Fairchild's lawyer, where he instructed Fairchild's lawyer to prepare those papers?

Mr. **Stewart**. Yes.

Mr. **Keith**. Then we have Judge Nixon signing an order denying the summary judgment motion on the cross-claims?

Mr. **Stewart**. And denying Fairchild's motion, yes.

Mr. **Keith**. That's right, in December?

Mr. **Stewart**. Right.

Mr. **Keith**. After a 30-minute hearing, in which Fairchild's lawyer is arguing the issue?

Mr. **Stewart**. Yes.

Mr. **Keith**. Then in April 1982 we have a pretrial conference of 30 minutes, with Fairchild's lawyer sitting at the table?

Mr. **Stewart**. Correct.

Mr. **Keith**. Where they're talking about how they're going to try the case and can it be settled?

Mr. **Stewart**. Well, it's not clear what they're talking about. What comes out of it is that they were to discuss settlement.

Mr. **Keith**. And the other thing that comes out of it is that Judge Nixon had decided that the limitation exoneration——

Mr. **Stewart**. Yes, would be tried first.

Mr. **Keith**. Again, we have settlement papers that Judge Nixon signed?

Mr. **Stewart**. Yes.

Mr. **Keith**. I guess the point I'm trying to make, Mr. Stewart, is that there were many opportunities in both cases for Judge Nixon to notice that Fairchild was involved?

Mr. **Stewart**. I knew that was your point.

Mr. **Keith**. That's all I have.

Mr. **Stewart**. Thank you.

Mr. **Keith**. Thank you.

Mr. **Edwards**. Mr. Stewart, how did Judge Nixon come to discover that Fairchild had an interest in this Transcontinental gas pipeline here?

Mr. **Stewart**. My understanding is that he noticed the reference to the Green Creek field in Marion County and knew that that was a field in which he—his royalty interest was in.

Mr. **James**. Yes. Who initiated all the—the grand jury investigation and how did it get started? I'll withdraw the question. I should have been——

Mr. **Stewart**. That's a question I'd love to answer.

Mr. **James**. You would? How long would it take you?

Mr. **Stewart**. Well, it was initiated by a disgruntled former employee of Fairchild, this somewhat erratic fellow who became convinced that there had been some kind of conspiracy between Fairchild and Judge Nixon.

Mr. **Edwards**. We had 6 days of hearings——

Mr. **James**. OK, I understand. OK.

Mr. **Stewart**. OK.

Mr. **James**. I'll withdraw the question.

Mr. **Edwards**. Well, thank you very much, Mr. Stewart. I believe that's all for today, and thank you for coming with Judge Nixon and Mrs. Nixon.

Mr. **Stewart**. Mr. Chairman, my only question was on this written matter that Congressman James asked about, will I be advised as to when the subcommittee would like our comments?

Mr. **Edwards**. How long would it take to provide that material, Mr. Stewart?

Mr. **Stewart**. I'm in some state of professional disruption right now since I am changing firms, so if I could have until—if I could have 2 weeks, it'd be great.

Mr. **Edwards**. We'll let you know.

Mr. **Stewart**. Thank you.

Mr. **Edwards**. Right.

[Whereupon, at 1:30 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

HEARING EXHIBITS

EXHIBIT 1

CHRONOLOGY OF NIXON-FAIRCHILD RELATIONSHIP

NIXON INVESTMENT W/FAIRCHILD per Nixon Subcommittee Testimony		CIVIL CASES HANDLED BY NIXON BOAM V. DEPENDABLE CASE #S-77-0385 (N)	
		10/18/77	- Complaint filed
		8/24/78	- Fairchild Construction Co. moves to intervene seeking $18,600 in damages.
		9/7/78	- Fairchild intervention granted by Magistrate Roper.
Feb. 1979 -	Nixon and Ingram discuss possible Fairchild investment. Nixon already knows of Fairchild Construction Co. (Tr.17). Nixon thereafter checks on Fairchild reputation	2/13/79	- Nixon enters default judgments on motions by other parties.
Spring 1979	Nixon tells Ingram he is interested in good investment with Fairchild (Tr.19). Says he can spend $10,000. (Tr.21)	5/3/79	- Nixon hears motions in case.
		5/23/79	- Dependable moves for summary judgment against Fairchild.
Summer 1979	Ingram tells Nixon that Fairchild would be "delighted" to put Nixon in mineral interests (Tr. 20)	6/5/79	- Case "referred" to Magistrate Roper. Nixon handles pending motions, renders orders on 6/8, 6/13 and 6/19 re other parties.

NIXON INVESTMENT W/FAIRCHILD	CIVIL CASES HANDLED BY NIXON
	ROAM V. DEPENDABLE CASE #S-77-0385 (N)
	7/9/79 -Order of reference to Roper signed by Nixon. Consent entered by four parties, but no written consent by Fairchild. Order notes that Nixon will enter judgment "if appropriate, upon review of the proceedings."
	8/9/79 - Dependable's summary judgment motion denied by Nixon. Fairchild remains in case.
	8/29/79 - Settlement agreement signed, calls for $17,000 payment to Fairchild Construction Co.
Late 1979 Ingram tells Nixon he has talked with Fairchild, identifies specific wells (Tr.20). Nixon's told cost will be $9500, and that Fairchild "will take his own sweet time" in concluding the transaction.	9/6/79 - Nixon approves settlement agreement.
	10/12/79 - Nixon approves payment of settlement funds.
	1/30/80 - Nixon signs order dismissing Fairchild in view of settlement.

NIXON INVESTMENT W/FAIRCHILD		CIVIL CASES HANDLED BY NIXON
		SEYMOUR V. L&A CONTRACTING CASE # S-80-0274 (N).
Late February or early March 1980	Nixon meets for the first time with Fairchild at the office of Fairchild Construction, "definitely" has agreement to go forward with investment. (Tr. 22-24).	2/13/80 - Case filed, seeking $6 million. Fairchild Construction Co. is named 2nd of five defendants.
		3/19/80 - Case reassigned from Russell to Nixon.
		7/11/80 - Fairchild moves for summary judgment vs. plaintiff.
		9/13/80 - Fairchild summary judgment motion granted by Nixon. Nixon enters conclusions of law and findings of fact in Fairchild's favor.
		12/1/80 - Fairchild motion for summary judgment against defendant Brown denied. Fairchild remains in case due to cross-claim of Brown.
Late February or early March 1981	Nixon accepts deeds from Fairchild Construction Co., borrows $9500 from Fairchild Construction.	
May 1981	Nixon meets again with Fairchild at Construction Co. office. Investments discussed. Nixon tells Fairchild, "If I can ever help you I will, and if I can't I'll tell you so." (Tr.40).	
February 18, 1982	First royalty check from Fairchild Construction Co.	

NIXON INVESTMENT W/FAIRCHILD

March 16, 1982 — Nixon has received $7,476.55 in royalties from Fairchild. Nixon makes $5,000 payment to Fairchild Contruction on notes.

May 14, 1982 — Nixon-Fairchild meeting and telephone call concerning Drew Fairchild (per Holmes).

By this date, Nixon has received a total of $9,553.39 in royalties from Fairchild.

CIVIL CASES HANDLED BY NIXON

SEYMOUR V. L&A CONTRACTING CASE # S-80-0274 (N).

4/16/82 - Nixon holds pretrial conference. Counsel for Fairchild present. Nixon directs parties to explore possible settlement.

5/17/82 - Pre-trial settlement of $670,000 approved by Nixon. Fairchild Construction Company pays nothing and is released from all potential liability. Insurance carrier for Fairchild-L & A joint venture contributes $166,250.

EXHIBIT 2

DECLARATION OF WALTER L. NIXON, JR.

1. I have reviewed the letter dated January 9, 1989 from Chairman Edwards and addressed to my counsel, inquiring about two cases that were filed in the Southern District of Mississippi, Seymour v. L & A Contracting Co., No. S80-0274(N), and The Boam Company v. Dependable Insurance Co., No. S77-0385(N).

2. I have no current recollection at all concerning the Boam Company case, which was filed more than ten years ago and which, based upon the docket sheets I have reviewed, was primarily handled by Magistrate Roper.

3. I do have a slight recollection of the Seymour case, primarily because of the seriousness of the injuries suffered by the plaintiff. I do not recall any of the particular issues raised in the case, the claims, or any orders that were entered. I note that the matter was settled before trial.

4. During the period when these cases were pending in the Southern District of Mississippi, I carried several hundreds of cases on my docket, which sometimes exceeded a thousand cases. I would ordinarily never see the pleadings in a case when they were filed or while the case was pending on preliminary matters, but only when the case came before me on a dispositive motion, for a pretrial conference or for trial. I recall very few of the cases that were settled before trial.

5. Upon review of the docket sheets in the two cases mentioned in Chairman Edwards' letter, I can see that W.R. Fairchild Construction Co. was involved in both actions. I have no recollection at all of noticing that fact at the time the cases were pending, or of connecting that fact with the oil interests that I purchased from Wiley Fairchild.

6. At no time did I discuss either case -- the Boam Company suit or the Seymour action -- with Wiley Fairchild, Carroll Ingram, or anyone representing Mr. Fairchild or any company in which he was involved. There was absolutely no connection in my mind between those cases and the oil interests I purchased from Mr. Fairchild.

7. I neither took any action nor failed to take any action in the Boam Company or Seymour cases because of the oil interests I purchased from Wiley Fairchild.

Under penalty of perjury, I declare that the foregoing statements are true and correct.

Walter L. Nixon, Jr.

Dated: January 25, 1989

EXHIBIT 3

DIST/OFFICE	DOCKET YR	DOCKET NUMBER	FILING DATE MO DAY YEAR	J	N/S	O	R	R 23	DEMAND $	OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR.	DOCKET NUMBER
538-1	77	0385	11 16 77	4	190	2	24		600		3804	D	S77-0385(N	

PLAINTIFFS

THE BOAM COMPANY and ~~GREY GULF CONTRACTING AND ENGINEERING CORPORATION~~

MAGNOLIA CONSTRUCTION COMPANY, INC. (Involuntary Party Pltf)
~~ABC RENTAL, INC.~~ per order 1-16-80
(Intervenor)

~~Thornton Construction Co. Inc.~~
(Intervenor 8-7-78)

~~Mississippi Valley Equipment Company,~~
(Intervenor)

Aetna Casualty & Surety Co. - Party Pltf.
(4-5-78)

SOUTHLAND STEEL, INC., (Intervenor)

vs

DEFENDANTS

~~DEPENDABLE INSURANCE COMPANY~~ and ~~NEWKIRK CONSTRUCTION CORPORATION~~

order 11-8-79 vs.

~~City of Gulfport and Mississippi Pump and Equipment Supply Co.-Party Defts~~
(4-5-78)

~~Hydro-Systems, Inc.~~ per order 6/20/7
(Third Party Deft)

REMOVAL FROM CIRCUIT COURT OF FIRST JUDICIAL DISTRICT
HARRISON COUNTY, MISSISSIPPI

sh

~~W.R. FAIRCHILD CONSTRUCTION COMPANY, LTD., Intervenor~~

~~CROWN EQUIPMENT COMPANY, INC., Intervenor~~

~~Moretrench American Corporation, Intervenor~~
~~Coast Materials, Intervenor~~
~~Glasser Steel Corporation, Intervenor~~

CAUSE

28 USC §1441, et seq.
Contract - Other
Action on public works contract against the principal and surety on bond

~~(FLORIDA STEEL CORPORATION (Intervenor) 11-15-79~~
order 1-16-80

ATTORNEYS

Gail A. Crowell
Harry R. Allen
Bryan, Nelson, Allen and Schroeder
P. O. Drawer 4108
Gulfport, MS 39501
864-4011

See Attached Sheet

~~Cy Faneca~~ Pete Carrubba
Daniel, Coker, Horton, Bell and Dukes
P. O. Drawer W
Gulfport, MS 39501
868-1111

Terry Kilpatrick
P. O. Box 1417
Gulfport, Ms. 39501
863-3303
(ABC Rental, Inc.)

T. Glover Roberts (Crown)
P. O. Box 1506
Gulfport, Ms. 39501
(863-9975)

~~Stanford E. Morse, Jr.~~
~~White and Morse~~
~~P. O. Drawer 100~~
~~Gulfport, MS 39501~~
~~863-9821~~
~~(City of Gulfport)~~
order 11-8-79

George H. Morse
George E. Morse
(Thornton Construction Co.)
Intervenor 8-7-78
P. O. Drawer 100
Gulfport, Ms. 39501
863-9821 (Ms. Valley Equipment Co.)
Intervenor-Pltf.

W. Timothy Jones / R. David Kaufman
Brunini, Grantham, Grower & Hewes
P. O. Drawer 119 (Hydro-Systems, Inc.)
Jackson, MS 39205
948-3101

Tommy Dulin
P. O. Box 820
Gulfport, Ms. 39501 864-7555

Watkins & Eager
Hassell Whitworth
800 Plaza Building
Jackson, Mississippi
(Miss. Pump & Equipment Co)

KELLY, HARSH & KELLY
Phillip C. Kelly (Hydro-Systems Inc.)
123 Public Square
Gallatin, TN 37066

Joe Sam Owen / Norman F. Cox
P. O. Box 673
Gulfport, Ms. 39501
868-2821

James B. Galloway
P.O. Drawer H
Gulfport, Ms. 39501
864-2682

Bruce Aultman (Fairchild)
Aultman, Aultman & Tyner
P. O. Drawer 750
Hattiesburg, Ms. 39401
583-2671

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS

FILING FEES PAID

DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS: CARD	DATE MAILED
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Richard B. Graves
Graves, Riley, Meadows & Walker
P. O. Drawer 550
Gulfport, Ms. 39501
864-5221
(Florida Steel Corp.)

Larry L. Lenoir
P. O. Box 4272
Gulfport, MS 39501
864-8665
(Magnolia Construction Co)

Leonard A. Blackwell, II
P. O. Drawer 430
Gulfport, Ms. 39501
864-1484
(Newkirk Construction Company)

James B. Ritchie /Jeffrey L. Sakas
Jessee, Ritchie & Duncan
620 Northside Tower
6065 Roswell Road, N. E.
Atlanta, Ga. 30328
(404) 256-0991

DATE	NR.	PROCEEDINGS
11-16-77		Petition for Removal from the Circuit Court of First Judicial District of Harrison County, Ms., to this District Court, with certified copy of lower Court proceedings attached, filed.
11-16-77		Notice of Removal, filed.
11-16-77		Removal Bond in the sum of $500.00 with Fidelity and Deposit Company of Maryland as Surety, filed.
11-16-77		Certificate of Service, filed.
11-18-77		Amendment to Petition for Removal, with Cert. of Service, with certified copy of lower Court proceedings attached, filed.
11-22-77		ANSWER, COUNTER-CLAIM and Cross Claim by defendant Dependable Ins. Company with certificate of mailing and exhibits attached, filed.
1-20-78		Motion of atty Terry Kilpatrick to withdraw as attorney of record for ABC Rentals, Inc., with cert. of service, filed. (Order to Judge)
3-6-78		Motion of Mississippi Valley Equipment Co. to intervene as pltf, with attached copy of Intervenors complaint, filed.
3-6-78		NOTICE that above motion be heard before Judge Roper on 3-16-78 at 9 AM, filed.
3-13-78		AGREED ORDER: that Mississippi Valley Equipment Company granted leave to file its complaint, in substantially the form set out as exhibit to its motion to intervene, filed and entered in OB 1978, Page 343. Copies mailed to attys.
3-13-78		Complaint of intervention of Mississippi Valley Equipment Company, filed.
3-13-78		Request of Deft. Dependable Insurance Company, to Clerk to Enter Default, with Cert of Service, filed.
3-13-78		Affidavit of Cy Faneca for Entry of Default by Clerk, filed.
3-13-78		Entry of Default of Newkirk Construction Corporation, filed.
3-15-7		Answer of Dependable Ins. Co. to complaint of Ms. Valley Equipment Co., with certificate of service, filed.
3-15-7		Answer of Dependable Ins. Co. to Intervention Petition of ABC Rental, Inc., with certificate of service, filed.
3-16-78		Notice of appearance of Tommy Dulin for ABC Rentals, Inc., with certificate of service, filed.
3-16-78		Entry of General appearance of ABC Rentals, Inc. for all purposes, filed.
3-16-78		Summons issued, for complaint of intervention of Mississippi Valley Equipment Co., original and 3 copies, copies having attached copy of intervention complaint and mailed to U. S. Marshls for service.
3-20-78		ANSWER and cross claim of Dependable Ins. Co., with certificate of service, with attached exhibit A and B, filed.
3-24-78		Letter from Cy Faneca, with attachments, filed.
3-24-78		Pltf's Motion to Dismiss Grey Gull Contracting and Engineering Corp. as party pltf and Counter-Deft, filed. (Agreed Order to Judge)

S77-0385(N)
PAGE 2

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
The Boam Company, et al	Dependable Insurance Company, et al	DOCKET NO. S77-0385(PAGE 2 OF ___ PAGES

DATE	NR.	PROCEEDINGS
3-27-78		Stipulation between the parties, with Cert. of Service, filed.
3-27-78		AGREED ORDER - Grey Gull Contracting and Engineering Corporation is dismissed without prejudice as a party plaintiff and as a counter-deft., filed and entered
3-29-78		Copy of letter from George M. Morse to Mr. Tommy Dulin dated 3-28-78 advising that Mississippi Valley Equipment Company does not oppose the motion to intervene by ABC Rentals, Inc., filed.
4-3-78		Marshal's return on summons, executed as to Brian Sullivan, agt. for Dependable Ins. Co. on 3-17-78, filed.
4-3-78		Marshal's return on summons, executed as to Heber Ladner, Secy of State for Newki Construction Corp. on 3-22-78, filed.
4-4-78		Letter from Secy of State with attached receipt showing that Newkirk Construction Company received process on 3-27-78, filed.
4-5-78		Motion of Plaintiff to join parties and amend complaint, with certificate of service, filed. (Order to Judge Roper for signature)
4-5-78		ORDER - Motion of Plaintiff is sustained and Aetna Casualty and Surety Co. is joined as party plaintiff and City of Gulfport and Mississippi Pump and Equipment Supply Co. are joined as party defts and plaintiff is authorized to filed its amended Complaint, filed and entered in OB-1978, page 457. Copies to attys.
4-10-78		AMENDED COMPLAINT, original and 2 copies, filed.
4-10-78		Summons, original and 2 copies, copies having attached thereto a copy of orig. complaint and amended complaint, issued and mailed to U. S. Marshal for service.
4-18-78		Marshal's return on summons executed as to Jack Barnett, Mayor of City of Gulfport. on 4-14-78, filed.
4-24-78	1978	ORDER - ABC Rental, Inc. begranted intervention herein, filed and entered in OB- page 551. Copie to attorneys.
5-3-78		Motion of Southland Steel, Inc. to intervene as plaintiff, with attachments, filed. (with attached copy of complaint)
5-3-78		NOTICE that above motion be heard before Judge Roper on 5-18-78 at 9 AM at Biloxi, filed.
5-4-78		ANSWER and Cross-Claim of Deft, Dependable Insurance Company, with Cert. of Service, with attached Exhibits A & B, filed.
5-9-78		Motion of Deft, City of Gulfport, for Additional Time, filed. (accompanied with order)
5-9-78		ORDER: that Deft, the City of Gulfport, granted until 6-1-78 to file answer, filed and entered in OB 1978, Page 621. Copies mailed to attys.
5-11-78		Request of plaintiffs for Clerk to enter Default with certificate of service, filed. Affidavit of Gail A. Crowell of entry of default by Clerk attached.
5-11-78		Entry of default of Newkirk Construction Company, filed.
5-1-78		Marshal's return on summons, executed as to Thomas H. Morgan, Ms [illegible] Pump and Equipment [illegible]

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF

DEFENDANT

DOCKET NO. ____

PAGE __ OF ___ PAGES

DATE	NR.	PROCEEDINGS
5-12-78		Complaint of ABC Rental, Inc. as party plaintiff, with certificate of service and with Exhibits A,B,C attached, filed.
5-17-78		SEPARATE ANSWER of Deft Mississippi Pump and Equipment Company, COUNTERCLAIM of Mississippi Pump and Equipment Company against Pltfs and THIRD-PARTY COMPLAINT of Deft Mississippi Pump and Equipment Company against Hydro-Systems, Inc.; Sep. ANSWER of Deft Mississippi Pump and Equipment Company to Amended Complaint of Pltfs, with cert. of service and Exhibits 1-5, filed.
5-17-78		Third Party Summons, original and 2 copies, copies having attached thereto a copy of Third Party Complaint (Answer and Counterclaim of Mississippi Pump and Equip. Co., Third Party Complaint and Answer to Amended Complaint all included in one instrument) issued and mailed to U. S. Marshal for service of process.
5-30-78		ANSWER of Dependable Insurance Company to Complaint of ABC Rental, Inc., with cert. of service, filed.
5-30-78		Letter from Socy. of State with attached return receipt showing process was received by Randy Baily, Hydro-Systems, Inc. on 5-22-78, filed.
5-30-78		Marshal's return on summons executed as to Hydro-Systems, Inc. by service on Secy of State on 5-18-78, filed.
6-6-78		Motion of Hydro-Systems, Inc., Third Party Deft, for Enlargement of Time to Plead with Cert. of Service, filed. (Order to Judge)
6-6-78		ORDER: that third-party deft, Hydro-Systems, Inc., granted enlargment of 20 days additional time to and including 6-27-78 to plead, answer or otherwise move in action as allowed by Rule 14 of FRCP, filed and entered in OB 1978, Page 799. Copies mailed to attys.
6-6-78		AGREED ORDER: that Southland Steel, Inc., granted leave to file complaint in substantially form set out as Exhibit to Motion for Leave to Intervene, filed and entered in OB 1978, Page 801. Copies mailed to attys.
6-21-78		Intervener's Complaint of Southland Steel, Inc., with attachments, original and 2 copies, filed.
6-21-78		Summons issued,original and 2 copies, copies having attached copies of Intervener's Complaint and mailed to U. S. Marshal for service.
6-27-78		ANSWER of Third-Party Deft, Hydro-Systems, Inc., and Counterclaim of Hydro-Systems, Inc., against Mississippi Pump and Equipment Company, The Boom Company and Aetna Casualty & Surety Company, with Exhibits A & B, with Cert. of Service, filed.
6-27-78		Marshal's return on summons, executed as to Newkirk Construction Corporationby service on Secy of State on 6-22-78, filed.
6-28-78		Request of Dependable Insurance Co. for Production of Documents, with Cert.of Service, filed.
6-28-78		Deft's, Dependable Insurance Company, Interrogatories propounded to Pltfs, with Cert. of Survice, filed.
6-28-78		ANSWER of Deft, Dependable Insurance Company to Complaint of Southland Steel, Inc., with Cert. of Service, filed.

DC 110A
(Rev. 1/75)

S77-0383(N)
Page 3

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
THE BOAN COMPANY, et al	DEPENDABLE INS. CO., et al	DOCKET NO. ______ PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
7-3-78		Letter from Secy of State with attached receipt showing that process was receive by Newkirk Construction Corp. by Linda Wilson on(no date shown), filed.
7-6-78		Pltfs' Interrogatories to deft Dependable Insurance Co.,with cert. of service, filed.
7-6-78		Notice of Interrogatories, filed.
7-10-78		Request of Plaintiffs for Production, with certificate of service, filed.
7-11-78		Answer of City of Gulfport, filed.
7-13-78		Motion of Thornton Construction Co., Inc., to Intervene, with attached Exhibit "A" filed.
7-13-78		NOTICE that above motion will be heard on 7-27-78 at 9:00 AM before Judge Roper in Biloxi, MS, filed.
7-14-78		Reply of deft. Mississippi Pump and Equipment Co. to affirmative Matter contained in answer of Third-Party Deft. Hydro-Systems, Inc. to Third-Party Complaint,with certificate of service, filed.
7-14-78		Answer of Mississippi Pump and Equipment Co. to counterclaim of Hydro-Systems,Inc with certificate of service, filed.
7-17-78		Pltf's Response to Request of Deft, Dependable Insurance Co., for Production of Documents, with Cert. of Service, filed.
7-27-78		ORDER: Thornton Construction Co., Inc. granted leave to file its Complaint in substantially the form set out as Exhibit "A" to its motion for leave to intervene, filed and entered in O.B. 1978, page 1192. Copies mailed to attys.
8-4-78		Response of City of Gulfport to Request for Production of Documents, filed.
8-4-78		Answer of Counter-Defendants The Boan Company and its Surety, The Aetna Casualty and Surety Company to Counter Claim of Hydro-Systems, Inc., with cert. of service filed.
8-7-78		Complaint of Intervenor, Thornton Construction, with cert. of service, original and 3 copies, filed.
8-7-78		Summons, original and 3 copies, copies having attached a copy of Intervenor's Complaint, issued and mailed to U. S. Marshal for service.
8-11-78		Marshal's return on summons, executed as to Brian Sullivan, Agent for Dependable Insurance Co. on 8-8-78, filed.
8-11-78		Marshal's return on summons, executed as to Heber Ladner, Secy of State, Agent for Newkirk Construction Corporation on 8-8-78, filed.
8-16-78		ANSWER of Dependable Insurance Company to Complaint of Thornton Construction Co., Inc.,with cert. of service, filed.
8-18-78		Notice of Hydro-Systems, Inc. to take deposition of Mississippi Pump and Equipment Co. on 9-6-78 at 9:30 a.m. in Jackson, Ms., with cert. of service, filed.

DC 111A
(Rev. 1-70)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. ____ PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
8-23-78		Notice of Postponement of Deposition and Request for Production of Documents, with cert. of service, filed.
8-25-78		Motion of W. R. Fairchild Construction Company, Ltd. for Leave to Intervene, with cert. of service and attachment, filed.
8-25-78		Notice that above Motion will be heard before Judge Roper in Biloxi on [illegible]-78 at 9:00 a.m., filed.
9-1-78		Letter from Secy of State with attached return receipt showing process was received by Newkirk Construction Corporation by service on Linda Wilson (Not Dated), filed.
9-7-78		ORDER: W. R. Fairchild Construction Company, Ltd., a limited co-partnership, be granted leave to file its Complaint and Counterclaim in substantially the form set forth as exhibit to its Motion for Leave to Intervene, filed and entered in O.B. 1978, page 1390. Copies mailed to attys.
9-7-78		Complaint and Counterclaim of Intervenor W. R. Fairchild Construction Company, Ltd., with cert. of service and Exhibits A thru F, filed.
9-14-78		Motion of Crown Equipment Company, Inc. for Leave to Intervene, with Exhibit "A", filed. (Order to Judge)
9-14-78		ORDER: Crown Equipment Company, Inc. granted leave to intervene as party pltf and to file its Intervention Petition; there is no need for process to issue for the defendants, the defts having waived service of process, filed and entered in O.B. 1978, page 1439. Copies mailed to attys.
9-14-78		Intervening Petition of Crown Equipment Company, Inc., filed.
9-15-78		Motion of Thornton Construction Company, Inc. to Amend Complaint, with cert. of service and Exhibit A, filed.
9-15-78		Notice that above Motion will be heard before Judge Roper in Biloxi on [illegible]-27-78 at 9:00 a.m., filed.
9-15-78		Motion of Mississippi Valley Equipment Company to Amend Complaint, with cert. of service and Exhibit A, filed.
9-15-78		Notice that above Motion will be heard before Judge Roper in Biloxi [illegible]-78 at 9:00 a.m., filed.
9-20-78		Motion of Moretrench American Corporation to Intervene, with Exhibit A, filed. (Order to Judge)
9-20-78		Motion of Glaser Steel Corporation to Intervene, with Exhibit A, filed. (Order to Judge)
9-20-78		Motion of Coast Materials Company to Intervene, with Exhibit A, filed. (Order to Judge)
9-21-78		ORDER: Moretrench American Corporation granted leave to intervene herein in order to assert such claims as it may desire for labor and materials, filed and entered in O.B. 1978, page 1478. Copies mailed to attys.
9-21-78		ORDER: Glaser Steel Corporation granted leave to intervene herein in order to assert such claims as it may desire for labor and materials, filed and entered in O.B. 1978, page 1479. Copies mailed to attys.

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
The Boam Company, et al	Dependable Insurance Co., et al	DOCKET NO. ______ PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
9-21-78		ORDER: Coast Materials Company granted leave to intervene herein in order to assert such claims as it may desire for labor and materials, filed and entered in O.B. 1978, page 1480. Copies mailed to attys.
9-25-78		ANSWER of Dependable Insurance Company to Intervening Petition of Crown Equipment Company, Inc., with cert. of service, filed.
9-25-78		ANSWER to Complaint and Counterclaim of W. R. Fairchild Construction Company, Ltd by Dependable Insurance Company, with cert. of service, filed.
10-2-78		Answer of Pltfs The Boam Co. and Aetna Casualty & Surety Co. to Counterclaim of W. R. Fairchild Construction Co., Ltd., with cert. of service, filed.
10-3-78		ORDER: Thornton Construction Co.,Inc. granted leave to amend its Complaint and to file Amended Complaint and Counterclaim as set out in Exhibit A to Motion, filed and entered in O.B. 1978, page 1536. Copies mailed to attys.
10-3-78		ORDER: Mississippi Valley Equipment Company granted leave to amend its Complaint and to file Amended Complaint and Counterclaim as set out in Exhibit A to Motion, filed and entered in O.B. 1978, page 1537. Copies mailed to attys.
10-10-78		AMENDED COMPLAINT and Counterclaim of Mississippi Valley Equipment Company, with cert. of service and Exhibits A-E, filed.
10-10-78		AMENDED COMPLAINT and Counterclaim of Thornton Construction Company, with cert. of service and Exhibit A-D, filed.
10- 6-78		ANSWER of Dependable Insurance Company to Amended Complaint and Counter-Claim of Mississippi Valley Equipment Company, with cert. of service, filed.
10-6--78		ANSWER of Dependable Insurance Company to Amended Complaint and Counter-Claim of Thornton Construction Company, with cert. of service, filed.
10-11-78		Answers of Dependable Insurance Company to Interrogatories, with affidavit of Cy Faneca and cert. of service, filed.
10-11-78		Response of Dependable Insurance Company to Request for Production of Documents with cert. of service and attachments, filed.
10-17-78		ANSWER of The Boam Company and Aetna Casualty and Surety Company to Counterclaim filed by Mississippi Valley Equipment Company, with cert. of service, filed.
10-17-78		ANSWER of The Boam Company and Aetna Casualty and Surety Company to Counterclaim filed by Thornton Construction Company, Inc., with cert. of service, filed.
10-23-78		Notice of Third Party Deft Hydro-Systems, Inc. to take deposition of Mississippi Pump and Equipment Company in Jackson, Ms. on 11-13-78 at 1:30 p.m. and Request for Production of Documents, with cert. of service, filed.
10-23-78		Notice of Hydro-Systems, Inc. to take deposition of Wallace H. Lemons in Jackson, Ms. on 11-13-78 at 1:30 p.m. With Production of Documents pursuant to Subpoena Duces Tecum, with cert. of service, filed.
10-26-78		Motion of Florida Steel Corporation to Intervene, with cert. of service and attachment, filed.
10-26-78		Notice that above Motion will be heard before Judge [illegible]

DC 111A
(Rev. 1-75)

S77-0385(N)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF

DEFENDANT

DOCKET NO. ________

PAGE ___OF___ PAGES

DATE	NR.	PROCEEDINGS
11-2-78		Motion of deft and Third-Party Pltf Mississippi Pump and Equipment Company to Amend Third-Party Complaint against Hydro-Systems, Inc., Third Party Deft, with cert. of service, filed. (Order to Judge)
11-3-78		ORDER: Third Party Complaint of Mississippi Pump and Equipment Company against Hydro-Systems, Inc. is amended by deleting page two of Exhibit 5 attached to said Third Party Complaint, filed and entered in O.B. 1978, page 1706. Copies mailed to attys.
11-6-78		Marshal's return on subpoena executed as to Wallace H. Lemons on 11-3-78, filed.
11-7-78		Answers of Dependable Insurance Company to Interrogatories, with cert. of service, filed.
11-7-78		ORDER: Florida Steel Corporation given leave to intervene and file Complaint immediately upon entry of this Order, with like effect as if orig. party pltf; each of parties have 15 days from 11-7-78 to answer complaint of Florida Steel Corp., filed and entered in O.B. 1978, page 1720. Copies mailed to attys.
11-13-78		Request of Pltf, Thornton Construction Company, Inc., to Enter Default against Deft, Newkirk Construction Company, with Cert. of Service, filed.
11-13-78		Affidavit of George M. Morse for Entry of Default, filed.
11-13-78		Entry of Default entered by Clerk of U. S. District Court against Deft, Newkirk Construction Corporation, filed.
11-13-78		Intervenor's Claim of Florida Steel Corporation, with certificate of service, filed.
11-14-78		ANSWER of Deft, Dependable Insurance Company, to Claim of Florida Steel Corporation, with Cert. of Service, filed.
11-16-78		ANSWER of Intervenor, Florida Steel Corporation, to Affirmative Defenses of Deft, Dependable Insurance Co., with Cert. of Service, filed.
11-16-78		Request of Intervenor, Mississippi Valley Equipment Co., to Enter Default against Newkirk Construction Corporation, filed.
11-16-78		Affidavit of George M. Morse For Entry of Default, with Cert. of Service, filed.
11-16-78		Entry of Default against Newkirk Construction Corporation entered by Clerk, U. S. District Court, filed.
11-16-78		Notice that Deposition will be taken of Gardner Russell on 12-4-78 at 9:30 AM in Gulfport, MS, with Cert. of Service, filed.
11-21-78		Return on Deposition Subpoena executed as to Gardner Russell on 11-20-78, filed.
12-11-78		Deposition of Wallace H. Lemons taken 11-13-78, filed.
12-11-78		Djeposition of C. E. Stone taken 11-13-78, filed.

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77
S78-0385(N)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF
The Boam Company, et al

DEFENDANT
Dependable Ins. Co., et al

DOCKET NO. ________
PAGE ___ OF ___ PAGES

DATE	NR	PROCEEDINGS
12-11-78		Motion of Mississippi Valley Equipment Company for Default Judgment against Newkirk Construction Corporation, with Notice that Motion will be heard before Judge Roper in Biloxi on 1-4-79 at 9:00 a.m. and with cert. of service, filed.
12-11-78		Affidavit of James L. Freeman, with attachment, filed.
12-11-78		Motion of Thornton Construction Company, Inc. for Default Judgment against Newkirk Construction Corporation, with Notice that Motion will be heard before Judge Roper in Biloxi on 1-4-79 at 9:00 a.m., and with cert. of service, filed.
12-11-78		Affidavit of John J. Thornton, with attachment, filed.
1-23-79		Proof of Publication, filed.
1-25-79		Deposition of GARNER RUSSELL taken on 12-5-78 in Gulfport, Miss., filed.
1-25-79		Continuation Deposition of Garner Russell taken on 12-27-78 in Gulfport, Mississippi, filed. (2 volumes) (EXHIBITS FOR deposition 1 through 12, inclusive, and 16 and 17. There are no exhibits numbered 13,14, or 15 as these were withdraw at the continuation deposition of December 27, 1978.)
2-13-79		JUDGMENT: Thornton Construction Company, Inc, Complainant, recover of deft Newkirk Construction Corporation, the sum of $9,652.50; this Default Judgment in no way affects the rights of Dependable Insurance Company, The Boam Company and Aetna Casualty and Surety Company as between each other and as regards the amended complaint filed by Thornton Construction Company, Inc. and in no way alters priorities set forth by law, and all such issues are reserved for hearing in further proceedings, filed and entered in O.B. 1979, page 311. Copies mailed to attys.
2-13-79		JUDGMENT: Mississippi Valley Equipment Company, Complainant, recover from deft. Newkirk Construction Corporation, the sum of $19,983.82; this Default Judgment in no way affects the rights of Dependable Insurance Company, The Boam Company and Aetna Casualty and Surety Company as between each other, and as regards the Amended Complaint filed by Mississippi Valley Equipment Company, and in no way alters priorities set forth by law, and all such issues are reserved for hearing in further proceedings, filed and entered in O.B. 1979, page 312. Copies mailed to attys.
2-19-79		Defts' Notice to take deposition of Mr. Gene Brady on 3-26-79 at 10:00 a.m., with cert. of service, filed.
2-22-79		Motion of City of Gulfport to Amend Deft's Answer and for Order under Rule #19 FRCP, Joining a Necessary party, with Exhibit "A" and cert. of service, filed.
2-22-79		Notice that above Motion will be heard before Judge Roper in Biloxi on 3-14-79 at 9:00 a.m., filed.
3-14-79		ORDER: City of Gulfport authorized to file its Amended Answer: City of Gulfport is authorized to join Magnolia Construction Company, Inc. as party-pltf, involuntary pltf or defendant, as the circumstances and the Court may subsequently direct, to show cause why proposed settlement of its contract with City of

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF

DEFENDANT

DOCKET NO. ______

PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
		not be approved or to assert any other claims which it may be entitled to assert against such deft, filed and entered in O.B. 1979, page 622. Copies mailed to attys.
3-14-79		ANSWER of deft City of Gulfport, with cert. of service, filed.
3-16-79		Marshal's return on process executed as to Cecil A. Ford, Magnolia Construction Company, on 3-15-79, filed.
4-4-79		Motion of Magnolia Construction Company, Inc. for Extension of Time, with attached NOTICE that motion will be heard on 4-16-79 before Judge Roper at 9:00 AM in Biloxi, MS, with Cert. of Service, filed.
4-4-79		Motion of Magnolia Construction Company, Inc. to be dismissed as Involuntary Party Pltf, with attached NOTICE that motion will be heard on 5-3-79 at 11:30 AM before Judge Nixon in Biloxi, MS, with Cert. of Service, filed.
4-16-79		ORDER: motion of movant for extension of time to plead is sustained and time for filing answer is extended to 10 days subsequent to date on which movant's motion to dismiss is ruled upon, filed and entered in O.B. 1979, page 919. Copies mailed to attys.
4-18-79		Motion of Pltf-Counterdefendants The Boam Company and Aetna Casualty and Surety Company for summary judgment dismissing counterclaim of Mississippi Valley Equip. Company, filed.
4-18-79		Motion of Pltf-Counterdefendant The Boam Company and Aetna Casualty and Surety Company for summary judgment dismissing counterclaim of Thornton Construction Co. filed.
4-18-79		Notice that above (2) motions for summary judgment will be heard before Judge Nixon in Biloxi on 5-3-79 at 11:30 p.m., with cert. of service, filed.
4-24-79		TENDER by Deft City of Gulfport, sums of $10,400.00 and $13,896.22 unto Magnolia Construction Company, Inc. by deposit with Clerk for Registry of Court, filed. Copy mailed to B. Price along with checks in above amounts for Regis. of Court.
5-4-79		ORDER: motion of Magnolia Construction Company to be dismissed as an involuntary party-plaintiff is overruled, filed and entered in O.B. 1979, page 1080. Copies mailed to attys.
5-18-79		COMPLAINT of Magnolia Construction Company, Inc., with cert. of service and Exhibits A and B, filed.
5-18-79		Motion of Magnolia Construction Company for Order to Disburse Funds Deposited into Registry of the Court, with Notice that motion will be heard before Judge Nixon in Biloxi at 9:30 a.m. on 6-5-79, and cert. of service, filed.
5-22-79		Request of Florida Steel Corporation to enter Default of Newkirk Construction Corp. with Affidavit of Richard B. Graves and cert. of service, filed.
5-22-79		Entry of Default.
5-22-79		Motion of Florida Steel Corporation for Default Judgment against Newkirk Construction Corp.with affidavit of George N. Kampouris and cert. of service, filed.

S77=0385 (N)

Page 6 S77-0385 (N)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
The Boam Company et al	Dependable Insurance Company et al	DOCKET NO. ____ PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
5-22-79		Notice that above Motion will be heard before Judge Roper in Biloxi at 9:00 a.m. on 6-14-79, filed.
5-24-79		Motion of Dependable Insurance Company for Judgment on Pleadings, or in the Alternative for Summary Judgment against Intervenor W. R. Fairchild Construction Co. Ltd., with cert. of service and attachments, filed.
5-24-79		Notice that above Motion will be heard before Judge Nixon in Biloxi at 9:30 a.m. on 6-5-79, with cert. of service, filed.
5-24-79		Motion of Dependable Insurance Company for Judgment on the Pleadings or in the Alternative for Summary Judgment against Intervenor Crown Equipment Company, with cert. of service and attachments, filed.
5-24-79		Notice that above Motion will be heard before Judge Nixon in Biloxi at 9:30 a.m. on 6-5-79, with cert. of service, filed.
5-24-79		Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment against Intervenor Mississippi Vall eyEquipment Company, with cert. of service and attachments, filed.
5-24-79		Notice that above Motion will be heard before Judge Nixon in Biloxi at 9:30 a.m. on 6-5-79, with cert. of service, filed.
5-24-79		Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment against Intervenor ABC Rental. Inc. with cert. of service and attachments, filed.
5-24-79		Notice that above Motion will be heard before Judge Nixon in Biloxi at 9:30 a.m. on 6-5-79, with cert. of service. filed.
5-24-79		Motion of Dependable Insurance Company for Judgment on the Pleadings or in the Alternative for Summary Judgment against Intervenor Southland Steel, Inc., with cert. of service and attachments, filed.
5-24-79		Notice that above Motion will be heard before Judge Nixon in Biloxi at 9:30 a.m. on 6-5-79, with cert. of service, filed.
5-24-79		Motion of Dependable Insurance Company for Judgment on the Pleadings or in the Alternative for Summary Judgment against Intervenor Florida Steel Corporation, with cert. of service and attachments, filed.
5-24-79		Notice that above Motion will be heard before Judge Nixon in Biloxi at 9:30 a.m. on 6-5-79, with cert. of service, filed.
5-24-79		Motion of Dependable Insurance Company for Judgment on the Pleadings or in the Alternative for Summary Judgment against Intervenor Thornton Construction Company, Inc. with cert. of service and attachments, filed.
5-24-79		Notice that above Motion will be heard before Judge Nixon in Biloxi at 9:30 a.m. on 6-5-79, with cert. of service, filed.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. ______ PAGE ___OF___ PAGES

DATE	NR.	PROCEEDINGS
6-5-79		Pltf Aetna Casualty and Surety Company's Answers to Interrogatories propounded by Dependable Insurance Company, with cert. of service, filed.
6-5-79		Pltf The Boam Company's Answers to Interrogatories propounded by Dependable Ins. Co., with cert. of service, filed.
6-8-79		ORDER: Clerk of the Court ordered to pay and disburse to Magnolia Construction Company, Inc., and Larry L. Lenoir, Attorney, P. O. Box 4272, Gulfport, Ms. from the monies held by him in Registry of Court the sum of $33,292.66 having heretofore been tendered by deft City of Gulfport, and such disbursement shall not in any way be to prejudice of rights of any parties to this cause nor to the rights of Movant as to any addit. sums so claimed against deft City of Gulfport, filed and entered in O.B. 1979, page 1308. Copies mailed to attys. Orig. mailed to B. Price.
6-12-79		Motion of Third Party Deft Hydro-Systems, Inc. to Dismiss its Counterclaim against pltfs, counter defts, The Boam Company and Aetna Casualty and Surety Company, filed. OTJ
6-12-79		Motion of pltfs and counterclaimant to Dismiss Complaint against Mississippi Pump and Equipment Company and the Counterclaim filed by Mississippi Pump and Equipment Company against pltfs, filed. OTJ.
6-14-79		ORDER: counterclaim of Hydro-Systems, Inc. against The Boam Company and Aetna Casualty and Surety Company is dismissed with prejudice at cost to Third Party Deft, Counterclaimant, filed and entered in O.B. 1979, page 1347. Copies mailed to attys.
6-14-79		ORDER: complaint filed by The Boam Company and Aetna Casualty and Surety Co. against Mississippi Pump and Equipment Company is dismissed with prejudice at cost to pltfs and the counterclaim filed by Mississippi Pump and Equipment Co. against The Boam Company and Aetna Casualty and Surety Company is idsmissed with prejudice at cost to pltfs, filed and entered in O.B. 1979, page 1348. Copies mailed to attys.
6-20-79		Joint Motion of Third Party Pltf Mississippi Pump and Equipment Co. and Third Party Deft Hydro-Systems, Inc. to Dismiss the Third Party Complaint against Hydro-Systems, Inc. and the Counterclaim filed by Hydro-Systems Inc. against Mississippi Pump and Equipment Company, with cert. of service, filed. OTJ
6-20-79		ORDER: Third Party Complaint filed by Mississippi Pump and Equipment Company against Hydro-Systems, Inc. is dismissed with prejudice at cost to Third Party Pltf and Counterclaim filed by Hydro-Systems, Inc. against Mississippi Pump and Equip. Company is dismissed with prejudice at cost to Third Party deft, filed and entered in O.B. 1979, page 1378-1379. Copies mailed to attys.
7-9-79		ORDER OF REFERENCE AND STIPULATION OF CONSENT TO TRIAL OF NON-JURY CASE BY U.S. Magistrate, filed and entered in O.B. 1979, page 1588. Copies mailed to attys.
7-30-79		Motion of Newkirk Construction Company to set aside Default Judgments, with cert. of service, filed.
7-30-79		Notice that above Motion will be heard before Judge Roper in Biloxi at 9:00 a.m. on 8-9-79, filed.

S77-0385(N) Page 7

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF
The Boam Company, et al

DEFENDANT
Dependable Insurance Company, et al

DOCKET NO. ______
PAGE ___OF___ PAGES

DATE	NR.	PROCEEDINGS
8-1-79		Pltf's Notice to take deposition of Tom Newkirk, of Newkirk Construction Company, at 2:00 p.m. on 8-10-79 in Gulfport, Ms., with cert. of service, filed.
8-6-79		Response of Dependable Insurance Company to Motion to Set Aside Default Judgments with cert. of service, filed.
8-6-79		Notice that Motion included in above Response will be heard before Judge Roper in Biloxi at 9:00 a.m. on 8-9-79, filed.
8-9-79		ORDER: Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment against Southland Steel, Inc. is DENIED, filed and entered in O:B. 1979, page 1832. Copies mailed to attys.
8-9-79		ORDER: Motion for Summary Judgment filed by Pltfs-Counter Defts, the Boam Company and Aetna Casualty & Surety Company, seeking dismissal of counterclaim filed by Mississippi Valley Equipment is DENIED, filed and entered in O.B. 1979, page 1831. Copies mailed to attys.
8-9-79		ORDER: Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment, against Mississippi Valley Equipment Company, is DENIED, filed and entered in O.B. 1979, page 1830. Copies mailed to attys.
8-9-79		ORDER: Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment, against Crown Equipment Company, is DENIED, filed and entered in O.B. 1979, page 1829. Copies mailed to attys.
8-9-79		ORDER: Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment against Thornton Construction Company, Inc. is DENIED, FILED AND ENTERED IN O.B. 1979, page 1828. Copies mailed to attys.
8-9-79		ORDER: Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment, against Florida Steel Corporation, is DENIED, filed and entered in O.B. 1979, page 1827. Copies mailed to attys.
8-9-79		ORDER: Motion for Summary Judgment filed by Pltfs-Counter Defts The Boam Company and Aetna Casualty & Surety Company seeking dismissal of counterclaim filed by Thornton Construction Company, is DENIED, filed and entered in O.B. 1979, page 1826. Copies mailed to attys.
8-9-79		ORDER: Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment against W. R. Fairchild Construction Company, Ltd. is DENIED, filed and entered in O.B. 1979, page 1825. Copies mailed to attys.
8-9-79		ORDER: Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment, against ABC Rental is DENIED, filed and entered in O.B. 1979, page 1824. Copies mailed to attys.
8-9-79		Affidavit of Thomas E. Newkirk, with Exhibits A, B and C, filed.
8-10-79		ORDER: entry of default as to Newkirk Construction Corporation be set aside, provided Newkirk file its Answer to cross-claim of Dependable Ins. Co. within 7 days from 8-9-79; that Dependable and Newkirk allowed 45 days from 8-9-79 for discovery, etc., Newkirk bear reasonable costs of Dependable's application for

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. ______ PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
		entry of default and Newkirks's motion to set aside; cause shall be bifurcated and claims between Dependable and Newkirk shall be heard separately on date to be set by Court subsequent to hearing prev. scheduled on 8-27-79, filed and entered in O.B. 1979, page 1861-1862. Copies mailed to attys.
8-10-79		ORDER: entry of defualt as to Newkirk Construction entered by Boam Co. and Aetna Casualty and Surety Company set aside; Answer to complaint due from Newkirk withi 7 days from 8-9-79; Newkirk pay reasonable costs incurred by Boam and Aetna in entry of said default and hearing on motion, filed and entered in O.B. 1979, pages 1854-1855. Cupies mailed to attys.
8-16-79		ANSWER and Affirmative Defenses of Newkirk Construction Company to Declaration of The Boam Company and Aetna Casualty and Surety Company, with cert. of service, filed.
8-16-79		ANSWER and Affirmative Defenses of Newkirk Construction Corporation to the Cross-Claim of Dependable Insurance Company, with cert. of service, filed.
8-17-79		Motion of Dependable Insurance Company for Leave to File Amended Answer and Cross-Claim, with attached Affidavit of Pete H. Carrubba, cert. of service and attached Exhibit, filed.
8-17-79		Notice that above Motion will be heard before Judge Roper in Biloxi at 9:00 a.m. on 8-27-79, filed.
8-20-79		ANSWER of City of Gulfport to complaint of Magnolia Construction Company, with cert. of service, filed.
8-20-79		Request by deft Newkirk Construction Corporation for Trial by Jury, with cert. of service, filed.
8-20-79		Motion of Pltfs The Boam Company and Aetna Casualty and Surety Company to Strike Counterclaim of deft Newkirk Construction Corporation, with cert. of service, filed.
8-20-79		ORDER: Court finds that Counterclaim of Newkirk Construction Corporation prejudic the rights of the Boam Company and Aetna Casualty and Surety Co. in that differen proof would be required by said parties from that which would be required if the Counterclaim had not been filed; in that the Boam Co. and Aetna would be allowed an addit. 90 days discovery and that said addit. time would delay the trial set for August 27, 1979, and therefore finds that said motion is well taken and said Counterclaim is striken, filed and entered in O.B. 1979, page 1904. Copies mailed to attys.
8-21-79		Deposition of Tom Newkirk taken 8-10-79, with attached volume of exhibits, filed.
8-21-79		Stipulation regarding Exhibits, filed.
8-21-79		Return on civil subpoena executed as to Tom Newkirk on 8-17-79, filed.
8-21-79		Motion of Mississippi Valley Equipment Company to Amend its Amended Complaint and Counterclaim, with Exhibits A and B, filed.
8-21-79		Notice that above Motion will be heard before Judge Roper in Biloxi at 9:00 a.m. on 8-27-79, with cert. of service, filed.

DATE	PROCEEDINGS	Date Order Judgment
8-24-79	List of Witnesses for Southland Steel, Inc., and List of Exhibits by Category, with Cert. of Service, filed.	
8-24-79	List of Witnesses for Newkirk Construction Corporation and List of Exhibits by Category, with certificate of service, filed.	
8-28-79	ORDER: Dependable Insurance Company granted leave to file its Amended Answer and Cross-Claim so as to incorporate therein amended paragraph XIII and a Sixth Defense, filed and entered in O.B. 1979, page 1955. Copies mailed to attys.	
8-28-79	AMENDED ANSWER and Cross-Claim of Dependable Insurance Company, with cert. of service and attachments, filed.	
8-28-79	ORDER: Mississippi Valley Equipment Company granted leave to amend its Amended Complaint and Counterclaim and to file its Second Amended Complaint and Counterclaim, filed and entered in O.B. 1979, page 1956. Copies mailed to attys.	
8-28-79	SECOND AMENDED COMPLAINT and Counterclaim of Mississippi Valley Equipment Company with Exhibits A thru E, filed.	
9-7-79	Settlement Agreement, approved by Judge Roper and Judge Nixon, filed. Copies mailed to attorneys.	
9-7-79	JUDGMENT: Magnolia Construction Company recover from City of Gulfport the sum of $1,250.00, together with costs, filed and entered in O.B. 1979, page 2100. Copies mailed to attys.	
10-12-79	DISBURSEMENT ORDER: Clerk of Court authorized and directed to disburse money having been paid into Registry of Court by Dependable Insurance Co. and Newkirk Construction Company as set out in Order, filed and entered in O.B. 1979, page 2475-2477. Copies mailed to attorneys. Orig. hand delivered to B. Price in Jackson by atty. Harry Allen.	
10-12-79	Dependable Insurance Company Check in sum of $253,100.00 deposited in Registry of Court.	
10-12-79	Thomas E. Newkirk check in sum of $2,500.00 deposited in Registry of Court.	
11/8/79	ORDER OF DISMISSAL: Claims of the Plaintiff against the City of Gulfport, and the claims of the City of Gulfport against the Plaintiff dismissed with prejudice at the cost of the respective parties. Copies mailed to attys.	
11-19-79	EXHIBITS MP-1 thru 5; G1 thru G12; MP7 thru 11; AB3; AB12; AB30 thru 39, filed.	
1-7-80	ORDER: Claim of Mississippi Valley Equipment Company as to Dependable Insurance Company and The Boss Company, is dismissed without prejudice, filed and entered in O.B. 1980, page 89. Copies mailed to attys.	
1-7-80	ORDER: Claim of Thornton Construction Company, Inc. as to Dependable Insurance Company and The Boss Company is dismissed without prejudice, filed and entered in O.B. 1980, page 88. Copies mailed to attys.	
1-7-80	ORDER: claim of intervenor Moretrench American Corporation is dismissed with prejudice, with each party to pay its own cost, filed and entered in O.B. 1980, page 82. Copies mailed to attys.	

S77-0385(N)

DATE	PROCEEDINGS	Date Order or Judgment Noted
1-7-80	ORDER: claims of plaintiffs against Dependable Insurance Company and Newkirk Construction Company are dismissed without prejudice, reserving all claims, defenses and rights of whatever description against Newkirk Construction Company, at cost of the respective parties, filed and entered in O.B. 1980, page 83. Copies mailed to attys.	
1-7-80	ORDER: claim of Defendant Dependable Insurance Company against Newkirk Construction Corporation, same as Newkirk Construction Company, and the claim of Newkirk Construction Corporation, same as Newkirk Construction Company, against Dependable Insurance Company are dismissed without prejudice, reserving all claims, defenses and rights of whatever description of each of said parties against the other, at the cost of the respective parties, filed and entered in O.B. 1980, pages 84-85. Copies mailed to attys.	
1-7-80	ORDER: claim of intervenor Glazer Steel Corporation is dismissed with prejudice, with each party to pay its own cost, filed and entered in O.B. 1980, page 86. Copies mailed to attys.	
1-7-80	ORDER: claim of intervenor Coast Materials Company, Inc. is dismissed with prejudice, with each party to pay its own cost, filed and entered in O.B. 1980, page 87. Copies mailed to attys.	
1-30-80	ORDER OF DISMISSAL; that the claim of Florida Steel Corporation as to Dependable Insurance Company, be and the same is hereby dismissed without prejudice, filed and entered in OB 1980-page 379. Copies mailed to attorneys.	
1-30-80	ORDER: That the claim of W.R.Fairchild Construction Co. is hereby dismissed with prejudice, and each party to pay its own costs, filed and entered in OB 1980-page 380. Copies mailed to attorneys.	
1-30-80	ORDER: That the claim of Southland Steel Corporation, is dismissed with prejudice, with each party to pay its own costs, filed and entered in OB 1980-page 381. Copies mailed to attorneys.	
1-30-80	ORDER: That the claim of ABC Rental, Inc. is hereby dismissed with prejudice, with each party to pay its own cost, filed and entered in OB 1980-page 382. Copies mailed to attorneys.	
1-30-80	ORDER: That the Crown Construction Company, Inc. is dismissed with prejudice, with each party to pay its own cost, filed and entered in OB 1980-page 383. Copies mailed to attorneys.	
	JS-6 Card.	

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

FIRST JUDICIAL DISTRICT

THE BOAM COMPANY and
GREY GULL CONTRACTING AND
ENGINEERING CORPORATION — PLAINTIFFS

VERSUS — NO. 15,866

DEPENDABLE INSURANCE COMPANY and
NEWKIRK CONSTRUCTION CORPORATION — DEFENDANTS

DECLARATION

Comes now the Plaintiffs, The Boam Company and Grey Gull Contracting and Engineering Corporation, by and through their attorneys, Bryan, Nelson, Allen and Schroeder, and for cause of action would show the following, to-wit:

I.

That the Plaintiff, The Boam Company is a Michigan Corporation qualified to do business in the state of Mississippi and the Plaintiff, Grey Gull Contracting and Engineering Corporation, is a Florida Corporation qualified to do business in the State of Mississippi.

II.

That the Defendant, Dependable Insurance Company, is a Florida Corporation, authorized to transact an insurance and bonding business in the State of Mississippi and upon whom service of process may be had by service on its agent for process, Bryan Sullivan, 550 Naples Road, Jackson, Mississippi.

III.

That the Defendant, Newkirk Construction Corporation, is a Georgia Corporation, not qualified to do business in the State of Mississippi, although it is doing business in the State of Mississippi and therefore has appointed the Secretary of State of the State of Mississippi as its agent for process, under the §13-3-57 of the Miss. Code Annotated (1972). Service of process may be had upon the Secretary of State of the State of Mississippi, and the address of Newkirk Construction Corporation is P.O. Box 728, Roswell, Georgia 30075.

IV.

That there are sub-contractors of Newkirk Construction Company that have not been paid by Newkirk Construction Company. Process may be served on these unknown parties by publication notice demanding all unknown parties in interest asserting any claim or right in the proceeds of said bond described henceforth, to plead, answer or demur to this Declaration.

V.

That Newkirk Construction Corporation, sub-contractor, entered into a Sub-Contract Agreement with The Boam Company on May 26, 1977 for performance of certain portions of the contract between The Boam Company and Grey Gull Contracting and Engineering Corporation and the City of Gulfport, Mississippi in connection with the construction of the erection of pump stations number 21, 25, 32, and renovation of pump station number 13 in Gulfport, Mississippi. Said Sub-Contract Agreement is attached hereto as Exhibit "A" and asked to be incorporated herein as though fully copies in words and figures.

VI.

That on July 19, 1976, the Defendant, Newkirk Construction Company executed a Sub-Contractors Bond with Defendant, Dependable Insurance Company, as surety to secure the faithful performance of its contract with The Boam Company. A copy of said bond is attached hereto as Exhibit "B" and asked to be incorporated herein as though fully copies in words and figures.

VII.

That on June 9, 1977, Dependable Insurance Company [illegible] formally notified by Boam that Newkirk Construction Company had defaulted and/or abandoned the contract for the erection of pump stations number 21, 25, 32, and renovation of pump station number 13 in Gulfport, Mississippi.

VIII.

That the Defendant, Newkirk Construction Company, unlawfully removed certain equipment and machinery from the Gulfport construction site after they defaulted even though under the Sub-Contract Agreement attached as Exhibit "A" executed by Newkirk Construction Company and The Boam Company, The Boam Company had a lien upon all materials, tools, appliances and equipment of sub-contractor on the premises or used in connection with said work.

IX.

That Mr. Brady of The Boam Company and Grey Gull Contracting and Engineering Corporation had several conferences with representatives of Dependable Insurance Company, namely Mr. Ed Seagraves, attorney for Dependable Insurance Company and Mr. Clyde Duckett of Rucker and Associates, regarding the Newkirk Construction Company default. That on or about July 8, 1977, Magnolia Construction Company prepared a written estimate for Clyde Duckett regarding the cost of completing the Newkirk contract. That on or about August 4, 1977, Mr. Brady of The Boam Company and Grey Gull Contracting and Engineering Corporation, sent a written estimate of the total cost for completion. That the Defendant, Dependable Insurance Company was also furnished with a list by Newkirk Construction Company of unpaid bills on the job.

X.

That the Defendant, Dependable Insurance Company, failed to respond although The Boam Company and Grey Gull furnished all the information necessary to enable the Defendant, Dependable Insurance Company, to fulfill its obligations on the subject bond. That on or about August 1[illegible] 977, Mr. Ed Seagraves, informed Mr. Brady of the Boam Company and Grey Gull that Dependable would not complete the contract and would not pay the outstanding bills.

XI.

That when Dependable failed to undertake the completion of the Newkirk Construction Company's contract, The Boam Company and Grey Gull Contracting and Engineering Corporation entered into a contract with Magnolia Construction Company on September 7, 1977 for the completion of the same. That because of the slow performance of Newkirk Construction Company on their contract and the failure of Dependable Insurance Company to perform their obligation under said bond, liquidated damages at the rate of $250.00 a day were being assessed and are continuing to be assessed by the City of Gulfport.

XII.

That on September 15, 1977, the City of Gulfport defaulted The Boam Company and Grey Gull Contracting and Engineering Corporation assigning as grounds that the sub-contractors of Newkirk Construction Company, who were Mississippi residents had not been paid by Newkirk. Nevertheless, Dependable Insurance Company willfully refused to pay the sub-contractors as it was obligated to do under said bond and willfully continues to refuse performance of its obligations under the bond, constituting a bad faith breach of contract which has severely damaged the reputation of these Plaintiffs and caused Plaintiffs additional costs of attorneys fees and other expense related to such willfull breach of contract by Defendant, Dependable Insurance Company.

XIII.

That the Plaintiff demands of the Defendants, jointly and severally, payment of actual damages and consequential damages sustained as a proximate result of Newkirk Construction Company's default of the contract in question.

XIV.

That the Plaintiffs are also entitled to punitive damages from Defendant, Dependable Insurance Company, resulting from the bad faith breach of Dependable on said bond.

WHEREFORE, premises considered, the Plaintiff demands judgment against Defendant, Newkirk Construction Corporation, and Defendant, Dependable Insurance Company, for actual damages, jointly and severally, in the sum of $400,000.00 and judgment against Defendant, Dependable Insurance Company, for punitive damages in the additional sum of $200,000.00.

Respectfully submitted,

BRYAN, NELSON, ALLEN AND SCHROEDER
Attorneys for Plaintiffs

Harry R. Allen

Harry R. Allen
BRYAN, NELSON, Allen and Schroeder
Attorneys at Law
Post Office Drawer 4108
Gulfport, Mississippi 39501
(6[illegible]) 864-4011

FILED
OCT. 18 1977
W. L. LEE
CIRCUIT CLERK
BY [illegible] D.C.

AULTMAN, AULTMAN, & TYNER
ATTORNEYS AND COUNSELORS
PROFESSIONAL BUILDING
HATTIESBURG, MISSISSIPPI 39401

T. E. [illegible]
[illegible]
JAMES [illegible], JR.
[illegible]
BRUCE C. AULTMAN
DORRANCE AULTMAN
THOMAS W. TYNER
LAWRENCE C. [illegible], JR.
DANIEL HURD HUDSON

P. O. DRAWER [illegible]
TELEPHONE [illegible]

August 24, 1978

FILED
AUG [illegible] 1978
[illegible] CLERK
BY ________

Mrs. Verta Lee Swetman
Deputy U. S. District Court Clerk
Post Office Building
Biloxi, Mississippi 39532

Re: The Boam Company, et al v.
Dependable Insurance Company, et al
Civil Action No. S77-0385(N)

Dear Mrs. Swetman:

We enclose herewith the original and one copy of Notice and Motion of W. R. Fairchild Construction Company, Ltd., for Leave to Intervene, which we shall appreciate your filing in captioned matter.

By copy of this letter, we are forwarding to the other attorneys of record and to the defendant Newkirk a copy of these pleadings as so filed.

Your many courtesies to us are very much appreciated.

Cordially yours,

Bruce C. Aultman

BCA/sa

Enclosures

cc: Hon. Harry R. Allen
Hon. Cy Faneca, Jr.
White and Morse
Newkirk Construction Corporation

STYLE OF CASE: DIVISION:

Boam v. Dependable ins.,et al Southern
S77-385(N)

APPEARANCES:
FOR PLAINTIFF(S): FOR DEFENDANT(S):

None Bruce Aultman

HEARING ON:

Motion to intervene

PRE-TRIAL: Hours Minutes MOTION: Hours Minutes 5

TRIAL: COURT Hrs. ins. JURY Hrs. Mins.

ISSUES JOINED:

PLACE OF HOLDING COURT: Biloxi, Ms
JUDGE(S) PRESIDING: John Roper
COURT REPORTER:
DATE(S) 9-7-78

ACTION TAKEN:

No objection to motion .

DEPUTY CLERK:
Floyd Hewitt

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION AT BILOXI

CIVIL ACTION NO. S77-0385(N)

THE BOAM COMPANY and
AETNA CASUALTY AND SURETY COMPANY PLAINTIFFS

VERSUS

DEPENDABLE INSURANCE COMPANY,
NEWKIRK CONSTRUCTION COMPANY,
CITY OF GULFPORT and MISSISSIPPI
PUMP AND EQUIPMENT SUPPLY COMPANY, ET AL DEFENDANTS

COMPLAINT AND COUNTERCLAIM

COMES NOW the Intervenor, W. R. Fairchild Construction Company, Ltd., a limited co-partnership organized and existing under the laws of the State of Mississippi, herein sometimes identified as FAIRCHILD, by and through its attorneys of record, and for cause of action and of relief would respectfully represent and show the following, to-wit:

1.

That the Intervenor, W. R. Fairchild Construction Company, Ltd., is a limited co-partnership organized and existing under the laws of the State of Mississippi, having its principal place of business in Hattiesburg, Forrest County, Mississippi, and intervenes as a claimant and as a counter-claimant, all as is hereinafter shown.

2.

That Plaintiff and Counter-Defendant, The Boam Company, herein sometimes identified as BOAM, is a Michigan corporation qualified to do business and doing business in the State of Mississippi, who is a Plaintiff in this cause, and is named as a Counter-Defendant herein.

3.

That the Plaintiff and Counter-Defendant, Aetna Casualty and Surety Company, herein sometimes identified as AETNA, is a Connecticut corporation authorized to do business and doing business in the State of Mississippi as an insurance and bonding concern, and is a Counter-Defendant herein. As is more fully hereinafter shown, said Plaintiff and Counter-Defendant, Aetna, is surety for the Plaintiff and Counter-Defendant, Boam, on certain performance and payments bonds, given in connection with contract identified in paragraph 6 hereof.

4.

The Defendant, Newkirk Construction Corporation, herein sometimes identified as NEWKIRK, is a Georgia corporation, not qualified to do business in the State of Mississippi, although doing business in the State, and has thereby appointed the Secretary of State of the State of Mississippi, as its process agent, pursuant to and under the provisions of Section 13-1-57, Mississippi Code, 1972, as amended, and that said Defendant has been served with process and is now a party to this cause, and is amenable to these proceedings. As hereinafter shown, said Defendant is a subcontractor of Plaintiff, The Boam Company and assumed the discharge of certain duties under the contract hereinafter identified.

5.

That the Defendant, Dependable Insurance Company, herein sometimes identified as DEPENDABLE, is a Florida corporation, authorized to transact insurance and bonding business in the State of Mississippi, and who has transacted such business, and who is amenable to process in this State, and who has been joined as a Defendant in this cause, and who is amenable to these proceedings. Said Defendant, Dependable, as surety for the Defendant, Newkirk, all as hereinafter shown, and is answerable herein under bonds hereinafter identified, in which Newkirk was principal and Dependable as surety, all as more fully hereinafter shown.

6.

Defendant, City of Gulfport, herein sometimes identified as CITY, is a municipal corporation organized and existing under the laws of the State of Mississippi, is now a party to these proceedings. On or about October 9, 1975, City entered into a certain public works contract with Boam and Grey Gull Contracting and Engineering Corporation, as joint venturers, which said contract has been fully assumed by Boam, being a contract under which Boam, and its co-venturer, Grey Gull, assumed certain duties to City in connection with Water & Sewer Improvement Program, Project No. 3, Interceptor Sewer & Pumping Stations, Northwest Gulfport Area, project No. C-280-311, a copy of said contract being hereto attached as Exhibit A and made a part hereof, and on which contract performance and payment bonds were posted by Boam, as principal, and Aetna, as surety, all as is more fully hereinafter shown.

7.

Next following the execution of said contract, Exhibit A, and under date of October 9, 1975, Boam, executed performance and payment bonds, as principal, with Aetna, as surety, in the contract amount of $2,245,198.98, conditioned according to law and which guaranteed the completion of said contract, and the payment of all claims for labor, materials, machinery, equipment, and other named items, incorporated into said work. A copy of said bond is hereto attached as Exhibit B, and is incorporated herein as though fully copied in words and figures.

8.

On May 26, 1976, Plaintiff, Boam, entered into a subcontract with Defendant, Newkirk, for the performance of certain portions of said work between Boam and Grey Gull, as joint venturers, and the City of Gulfport, a copy of said subcontract being hereto attached as Exhibit C, and incorporated herein as though fully copied at length in words and figures.

9.

On or about July 19, 1976, the Defendant, Newkirk, as principal, and the Defendant, Dependable, as surety, executed a bond to secure the faithful performance of its subcontract (Exhibit C), with Boam, a copy of which said bond is hereto attached, marked Exhibit D, and incorporated herein as though copied at full length in words and figures. On or about April 12, 1977, pursuant to solicitation by Newkirk, Fairchild furnished materials and performed labor in the furtherance of said job, which labor and materials were incorporated into said job, in the sum of $18,600.00, which sum was due and payable on or about May 9, 1977. There is attached hereto as Exhibit E, a true statement of said account, duly authenticated, and no part of which has been paid, and no part of which is subject to offset or counterclaim, but the entire of said sum is due, payable, and unpaid. The entire of said materials furnished and labor performed were incorporated into said contract job between Boam and the Defendant, City of Gulfport. Fairchild has advised the City of Gulfport, Newkirk, Dependable, Boam, and Aetna of said services and materials so furnished, and of said indebtedness and has demanded payment therefor, but no part of said amount has been paid. Said labors performed and materials furnished on said job were contemplated and protected by said bonds executed by Boam and Aetna (Exhibit B) and by Newkirk and Dependable (Exhibit D), all as contemplated and provided by Chapter 5, Mississippi Code, as recompiled and amended, and other applicable statutes. Fairchild is a beneficiary of and is entitled to the protection of said bonds, and to recover therefrom the said sum of $18,600 for labor and materials incorporated into said job, plus such other recovery as is authorized by said bonds and by law.

10.

After Fairchild furnished said materials and performed said labor, and under date of September 15, 1977, Defendant, City of Gulfport, caused to be adopted a certain resolution, a copy of which is hereto attached, marked Exhibit F, and is made a part hereof as if copied at full length herein, and under date of September 19, 1977, caused notice therein identified to be published in the Daily Herald, a newspaper having general circulation in the Cities of Gulfport and Biloxi, Mississippi, a copy of which said notice is hereto attached, and is incorporated herein as Exhibit F-1. More than six (6) months have transpired next following the publication of said notice, but less than twelve (12) months have transpired theresince, so that this action is timely brought.

11.

That under date of October 18, 1977, Plaintiffs, The Boam Company and Grey Gull Contracting and Engineering Corporation, caused to be filed in the Circuit Court of the First Judicial District of Harrison County, Mississippi, Cause No. 15,866, and under date of November 1, 1977, caused statutory notice to be published in the Sun Herald, a newspaper published in the City of Gulfport, Harrison County, Mississippi, and having a general circulation in said area, a copy of which notice is hereto affixed, marked Exhibit G, and made a part hereof as if copied at full length herein. Said Cause No. 15,866, First District, Circuit Court of Harrison County, Mississippi, was antecedent to this action now pending in this Honorable Court, in that the same was duly removed to this Honorable Court. Said Plaintiffs, joined in by the Plaintiff, Aetna Casualty and Surety Company, after said removal was accomplished, filed its Amended Complaint in this Honorable Court dated April 10, 1978, and said cause, and all issues related thereto, are now properly pending before this Honorable Court, and subject to full and complete adjudication of all issues related to or arising therefrom by this Honorable Court and in this cause.

12.

Fairchild is a beneficiary of said bonds executed by Boam, as principal, and Plaintiff, Aetna, as surety, Exhibit B hereof, and of bond posted by Newkirk, as principal, and Dependable, as surety, Exhibit C hereof, and Fairchild is entitled to recover the said sum of $18,600.00, with interest, court costs, and attorneys' fees, jointly and severally, in said amount.

13.

That Defendant, Dependable, is liable to Fairchild, as beneficiary of said bonds, for all amounts owed by Newkirk to Fairchild, for which demand is here made.

COUNTERCLAIM

And for its Counterclaim, Fairchild re-adopts singular and all of that heretofore said, and says that it is a beneficiary of the bond, Exhibit B, executed by Boam as principal and Aetna as surety, Boam and Aetna being herein named as Counter-Defendants and demand being made by Fairchild, as beneficiary under said bonds, against said Counter-Defendants for the said sum of $18,600.00, for labor performed and materials furnished and incorporated into said contract job, all as hereinabove shown, plus interest, attorneys' fees, and court costs, all as provided by said bonds, and by applicable statutes appertaining thereto.

WHEREFORE, premises considered, Fairchild demands judgment against Defendants Newkirk and Dependable and against Counter-Defendants, Boam and Aetna, jointly and severally, in the said sum of $18,600.00, plus interest at the rate provided by law, and plus attorneys' fees and court costs, and plus other damages protected by said bonds, and for which recovery of said amounts demand is here made, and Fairchild prays the Court for entry of judgment accordingly.

W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD.

By: ______________________
Bruce C. Aultman
Its Attorney

Bruce C. Aultman
Aultman, Aultman & Tyner
Post Office Drawer 750
Hattiesburg, Mississippi 39401
(601) 583-2671

CERTIFICATE

I, Bruce C. Aultman, of counsel for W. R. Fairchild Construction Company, Ltd., do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Complaint and Counterclaim to the following:

The Boam Company and Grey
Gull Contracting and Engineering
Corporation & Aetna Casualty & Surety Company
c/o Harry R. Allen
Bryan, Nelson, Allen & Schroeder
P. O. Drawer 4108
Gulfport, Mississippi 39501
Their Attorney

Dependable Insurance Company
c/o Cy Faneca, Jr.
Daniel, Coker, Horton, Bell & Dukes
Suite 201, Security Savings Building
Gulfport, Mississippi 39501
Attorneys of Record

City of Gulfport
c/o White and Morse
Attorneys at Law
P. O. Drawer 100
Gulfport, Mississippi 39501
Its Attorney

Newkirk Construction Corporation
P. O. Box 728
Roswell, Georgia 30075
Defendant

This, the 7th day of September, A. D., 1978.

Bruce C. Aultman

[illegible] on the attached drawings (Sheets 1 of 35 to 35 of 35 inclusive)

7.12 [illegible] 1 to 1 inclusive, and

7.13 [illegible] Change Orders, duly delivered after execution of this Agreement.

7.14

Article 8. [illegible]

[illegible] are defined in Article 1 of the General Conditions shall have the [illegible]

[illegible] OWNER [illegible] CONTRACTOR shall, without the prior written consent of the other, assign or [illegible] Contract Documents, and, specifically, CONTRACTOR shall [illegible] that without the prior written consent of OWNER.

[illegible] OWNER [illegible] CONTRACTOR each binds himself, his partners, successors, assigns and legal representatives [illegible] covenants, agreements and obligations contained in the Contract Documents.

This document has important legal consequences; consultation with an attorney is encouraged with respect to [illegible].

STANDARD FORM OF AGREEMENT
BETWEEN OWNER AND CONTRACTOR
ON THE BASIS OF A STIPULATED SUM

THIS AGREEMENT made as of the 9th day of October in the year 19[illegible], by and between

City of Gulfport
City Hall
Gulfport, MS 39501

(hereinafter called OWNER) and

The Lane Company &
Grey Gull Contracting & Engineering Corp.
P. O. Box 5753
Orlando, FL 32805

(hereinafter called CONTRACTOR).

WITNESSETH, that the OWNER and CONTRACTOR, in consideration of the mutual covenants hereinafter set forth, agree as follows:

Article 1. WORK. The CONTRACTOR shall perform all Work as specified or indicated in the Contract Documents for the completion of the Project generally described as follows:

City of Gulfport
Water & Sewer Improvement Program
Project No. 1
Interceptor Sewer & Pumping Stations
Northwest Gulfport Area
Project No. C-280-311

Article 2. ENGINEER. The Project has been designed by

Brown & Russell, Inc.
520 33rd Street
P. O. Box 1477
Gulfport, MS 39501

[illegible] ENGINEER [illegible] completion of the Project in accordance with the Contract Documents.

Article 3. CONTRACT TIME. The Work will be completed within 250 days after the date when the Contract Time commences to run as provided in paragraph 2.3 of the General Conditions.

NSPE 1910-8-A-1 (1974 Edition)

© 1974, National Society of
Professional Engineers

[illegible] between OWNER and CONTRACTOR and may only be altered, amended or repealed by a duly executed written instrument.

Article 9. OTHER PROVISIONS.

None

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written

OWNER City of Gulfport

By Charles L. Walker
Charles L. Walker

(CORPORATE SEAL)

Attest

CONTRACTOR The Boxa Company & Grey Gull Contracting & Engineering Co

By William E. Meadowcroft
William E. Meadowcroft, Vice Presid

(CORPORATE SEAL)

By Eric E. Schaaf
Eric E. Schaaf, President

Attest Elizabeth H. Schaaf
Asst Secretary

Article 4. CONTRACT PRICE. OWNER shall pay CONTRACTOR for performance of the Work in accordance with the Contract Documents in current funds as follows:

[illegible]
(use separate form for Cost-Plus Contracts)

In accordance with Bid for Unit Price Contracts submitted August 14, 1975, an amount of Two Million, Two Hundred Forty Six Thousand, One Hundred Eighty Eight and 98/100 Dollars. ($2,246,188.98)

Article 5. APPLICATIONS FOR PAYMENT. CONTRACTOR shall submit Applications for Payment in accordance with Article 14 of the General Conditions. Applications for Payment will be processed by ENGINEER as provided in the General Conditions.

Article 6. PROGRESS AND FINAL PAYMENTS. OWNER shall make progress payments on account of the Contract Price on the basis of CONTRACTOR's Applications for Payment as approved by ENGINEER, on or about the 15th day of each month during construction as provided below. All progress payments will be on the basis of the progress of the Work measured by the schedule of values provided for in paragraph 14.1 of the General Conditions.

6.1 Prior to Substantial Completion progress payments will be in an amount equal to:

90 % of the Work completed, and

90 % of materials and equipment not incorporated in the Work but delivered and suitably stored, less in each case the aggregate of payments previously made.

6.2 Upon Substantial Completion, OWNER shall pay an amount sufficient to increase total payments to CONTRACTOR to [illegible] of the Contract Price, less retainages as ENGINEER shall determine in accordance with paragraph 14.7 of the General Conditions.

6.3 Upon final completion of the Work and settlement of all claims, OWNER shall pay the remainder of the Contract Price.

Article 7. CONTRACT DOCUMENTS. The Contract Documents which comprise the contract between OWNER and CONTRACTOR are attached hereto and made a part hereof and consist of the following:

7.1 This Agreement (pages 1 to 4, inclusive).

7.2 Exhibits to this Agreement (pages None, inclusive).

7.3 CONTRACTOR's Bid and Bonds consisting of 16 pages.

7.4 Notice of Award.

7.5 Invitation to Bid, XXXXXXXXXXXXXXXXXXXXXXXXX (pages 1 to 6, inclusive).

7.6 General Conditions (NSPE Document 1910-8, 1974 edition (pages 1 to 25, inclusive).

7.7 Supplementary Conditions (pages 1 to 3, inclusive). & Special Conditions (Pages 1 to 17 inclusive)

7.8 Specifications (pages 1-1 to 10-2, inclusive).

U.S. DEPARTMENT OF COMMERCE
ECONOMIC DEVELOPMENT ADMINISTRATION

Bond No. 035 53 033781

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS: that

The Boam Company and Grey Gull Contracting and Engineering Corp.,

(Name of Contractor)

P. O. Box 3753, Orlando, Florida 32805

(Address of Contractor)

a Corporations, hereinafter called Principal, and

(Corporation, Partnership, or Individual)

The Aetna Casualty and Surety Company, a Connecticut Corporation,

(Name of Surety)

1100 Detroit Bank & Trust Building, Detroit, Michigan 48226

(Address of Surety)

hereinafter called Surety, are held and firmly bound unto City of Gulfport,

(Owner)

City Hall, Gulfport, Mississippi 39501

(Address of Owner)

hereinafter called Owner, in the penal sum of Two million two hundred forty six thousand one hundred eighty eight and 98/100 Dollars, ($2,246,188.98)

in lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION is such that whereas, the Principal entered into a certain contract with the Owner, dated the 9th day of October, 196_, a copy of which is hereto attached and made a part hereof for the construction of: City of Gulfport

Water & Sewer Improvement Program Project No. 3, Interceptor Sewer &

Pumping Stations, Northwest Gulfport Area, Project No. C-280-311

NOW, THEREFORE, if the Principal shall well, truly and faithfully perform its duties, all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term thereof, and any extensions thereof which may be granted by the Owner, with or without notice to the Surety, and if he shall satisfy all claims and demands incurred under such contract, and shall fully indemnify and save harmless the Owner from all costs and damages which it may suffer by reason of failure to do so, and shall reimburse and repay the Owner all outlay and expense which the Owner may incur in making good any default, then this obligation shall be void; otherwise to remain in full force and effect.

(Over)

Exhibit B

PROVIDED, FURTHER, that the said Surety, for value received hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the contract or to the work to be performed thereunder or the specifications accompanying the same shall in any wise affect its obligation on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the contract or to the work or to the specifications.

PROVIDED, FURTHER, that no final settlement between the Owner and the Contractor shall abridge the right of any beneficiary hereunder, whose claim may be unsatisfied.

IN WITNESS WHEREOF, this instrument is executed in [illegible] counterparts, each one of which shall be deemed an original, this the 9th day of October 19[illegible]

ATTEST:

[illegible]

Frank Beasty

Secretary

GREY GULL CONTRACTING AND ENGINEE
CORP.

P. O. Box 5753

Orlando, Florida 32805

P.O. Box 5753
Orlando, Fla 32805

THE AETNA CASUALTY AND SURETY COMPANY

L. Knox Brandon,

ATTEST
(see attached Power of
Attorney Certificate)

(SEAL)

Geraldine Williams
Geraldine Williams
22555 Northwestern Highway
Southfield, Michigan 48075

1100 Detroit Bank & Trust Building
Detroit, Michigan 48226

COUNTERSIGNED BY

Horace [illegible], Licensed Resident
Mississippi Agent

NOTE: Date of Bond must not be prior to date of Contract.
If Contractor is Partnership, all partners should execute bond.

IMPORTANT: Surety companies executing bonds must appear on the Treasury Department's most current list (Circular 570 as amended) and be authorized to transact business in the State where the project is located.

FORM ED-123 U.S. DEPARTMENT OF COMMERCE
ECONOMIC DEVELOPMENT ADMINISTRATION

Budget Bureau Approval
Not Required

PAYMENT BOND

Bond No. C65 SB 033761

KNOW ALL MEN BY THESE PRESENTS: that

The Boam Company and Grey Gull Contracting and Engineering Corp.,
(Name of Contractor)

P. O. Box 5753, Orlando, Florida 32805
(Address of Contractor)

a Corporations, hereinafter called Principal,
(Corporation, Partnership or Individual)

and The Aetna Casualty and Surety Company, a Connecticut Corporation,
(Name of Surety)

1100 Detroit Bank & Trust Building, Detroit, Michigan 48226
(Address of Surety)

hereinafter called Surety, are held and firmly bound unto City of Gulfport,
(Name of Owner)

City Hall, Gulfport, Mississippi 39501
(Address of Owner)

hereinafter called Owner, in the penal sum of Two million two hundred forty six thousand one hundred eighty eight and 98/100 Dollars ($2,246,198.98) in lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION is such that whereas, the Principal entered into a certain contract with the Owner, dated the 9th day of October, 19[illegible], a copy of which is hereto attached and made a part hereof for the construction of: City of Gulfport Water & Sewer Improvement Program Project No. 3, Interceptor Sewer & Pumping Stations, Northwest Gulfport Area, Project No. C-280-311

NOW, THEREFORE, if the Principal shall promptly make payment to all persons, firms, subcontractors, and corporations furnishing materials for or performing labor in the prosecution of the work provided for in such contract and any authorized extension or modification thereof, including all amounts due for materials, lubricants, oil, gasoline, coal and coke, repairs on machinery, equipment and tools, consumed or used in connection with the construction of such work, and all insurance premiums on said work, and for all labor, performed in such work whether by subcontractor or otherwise, then this obligation shall be void, otherwise to remain in full force and effect.

(Over)

Exhibit B

PROVIDED, FURTHER, that the said surety, for value received hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the contract or to work to be performed thereunder or the specifications accompanying the same shall in any wise affect its obligation on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the contract or to the work or to the specifications.

PROVIDED, FURTHER, that no final settlement between the Owner and the Contractor shall abridge the right of any beneficiary hereunder, whose claim may be unsatisfied.

IN WITNESS WHEREOF, this instrument is executed in [illegible] counterparts, each one of which shall be deemed an original, this the [illegible] day of October, 19[illegible].

THE BOOK COMPANY

ATTEST: Frank Beach (Secretary)

By William E. [illegible] V

GREY GULF CONTRACTING AND ENGINEER[illegible] CO.

By [illegible]

(SEAL)

Deborah V. Duffy
(Witness as to Principal)

P O Box 5753
(Address)

Orlando Fla. 32805

P. O. Box 5753
(Address)

Orlando, Florida 32805

THE AETNA CASUALTY AND SURETY COMP[illegible]

ATTEST:

(see attached Power of Attorney Certificate)
(Assistant Secretary)

(SEAL)

Geraldine Williams
(Witness as to Surety)
Geraldine Williams

23555 Northwestern Highway
(Address)
Southfield, Michigan 48075

L. Knox Brandon
(Attorney-in-Fact)
L. Knox Brandon,
1100 Detroit Bank & Trust Build[illegible]
(Address)
Detroit, Michigan 48226

COUNTERSIGNED BY:
Wallace [illegible], Licensed
[illegible] Mississippi

NOTE: Date of Bond must not be prior to date of Contract.
If Contractor is Partnership, all partners should execute bond.

IMPORTANT: Surety companies executing bonds must appear on the [illegible] current list (Circular 570 as amended) and be authorized to [illegible] the project is located.

SUB-CONTRACT AGREEMENT

SUB-CONTRACTOR [illegible] CONSTRUCTION CORPORATION

SUB-CONTRACTOR AMT. $[illegible]

JOB [illegible] C-311 [illegible], MISSISSIPPI

DATE [illegible]

Exhibit C

SUB-CONTRACT AGREEMENT

THIS AGREEMENT, made this [illegible] day of May A.D. 19[illegible], by and between The Ross Company [illegible] hereinafter called the "Contractor," and [illegible] of Roswell, Georgia [illegible] hereinafter called the "Sub-Contractor",

For the consideration hereinafter named, the said Sub-Contractor covenants and agrees with the Contractor, as follows:

FIRST: (a) In this contract the word "Work" shall mean the work, labor, services, materials, matters and things required to be done and furnished by the Sub-Contractor under this contract.

(b) The word "Owner" shall mean the person, firm, corporation, municipality, county, or department or agency of the State or Federal government [illegible] contracting with the Contractor for the performance of the work.

(c) The word "Architect" or "Engineer" shall mean the Architect or Engineer or other representative of the owner under whose supervision [illegible] the work is required to be done by the terms of the primary contract between the Owner and the Contractor.

(d) The word "Building" or "Structure" shall [illegible] mean and include [illegible] landscaping, roads, streets and other subjects [illegible] as provided for in the primary and principal contract between the Owner and the Contractor.

(e) The "Owner" is City of Gulfport, Mississippi [illegible] of [illegible]

(f) The Sub-Contractor agrees to provide the work required to complete and will complete the following described items of work in connection with the erection of Pump Stations #21, #[illegible], 32 and renovate Pump Station #13 at Gulfport, Mississippi. Contract #C-[illegible]-311.

[illegible] all and will furnish all labor, material, scaffolding, equipment, machinery, tools, apparatus, transportation, all required shop drawings, all [illegible] and shall [illegible] as directed by Contractor, completely clean all work and remove all debris from job site, and perform all work necessary to complete Pump Stations #[illegible], #[illegible], 32 and renovate Pump Station #13, [illegible]

[illegible] as shown on [illegible] the drawings and specifications, including addenda thereto, if any, all of which Sub-Contractor hereby acknowledges [illegible] Project No. [illegible]-311, Plans, Specifications, Contract, [illegible] including the GENERAL CONDITIONS and/or [illegible] as prepared by Architect or Engineer, Brown & Russell, Inc., Gulfport, Miss. [illegible] [illegible] all of which are on file in the office of Contractor, and shall be considered as part of and [illegible] this agreement. [illegible] shown on drawings though not mentioned in specifications, or described in specifications and not shown on drawings, shall be accepted as part of this work, and said drawings and specifications shall be construed as supplementing one another.

(g) As all the provisions of the Prime Contract between The Ross Company & The City of Gulfport, Miss. [illegible] Project No. [illegible]-311 [illegible] dated [illegible] are to govern the work under this Sub-Contract [illegible] the Sub-Contractor is bound by all of the terms of the Prime Contract, including [illegible], but not by way of [illegible], all direct or indirect [illegible] to Contractor.

SECOND: (a) The Sub-Contractor agrees to proceed at once with the preparation of material and shall promptly submit shop drawings and [illegible] and to proceed to [illegible] work as [illegible] as instructed by Contractor and shall carry on said work promptly, efficiently and at a speed that will [illegible] the progress of Contractor's work or other branches of the work carried on by other sub-contractors. If, in the opinion of the Contractor, the Sub-Contractor is behind in the progress of the work to be done under this sub-contract, the Contractor may direct the Sub-Contractor to take such steps as the Contractor deems necessary to improve the rate of progress, including requiring the Sub-Contractor to increase the number of [illegible] overtime operations, days of work, amount of plant or other remedies and to submit for approval an outline schedule demonstrating [illegible] manner in which the required rate of progress will be regained, without additional cost to the Contractor. Contractor may require Sub-Contractor to prosecute in preference to other parts of the work such part or parts as Contractor may specify. Sub-Contractor shall maintain a competent and experienced superintendent or foreman on the job at all times, with authority to carry out directions of the Contractor relating to the Sub-Contractor's work or requirements. Sub-Contractor shall at all times supply adequate tools, appliances and equipment, shall also at all times supply and [illegible] for a sufficient number of properly skilled workmen and a sufficient amount of materials and supplies of proper quality to efficiently [illegible] prosecute said work, and shall promptly pay for materials furnished or used by him on said work and shall pay all workmen each week, and [illegible] by the Contractor, shall at least [illegible] furnish Contractor weekly with signed receipts from workmen showing the date of payment, amount paid, [illegible] on which said work was performed, and two copies of the payroll certified by Affidavit, and to complete fully the work as [illegible]

[illegible] installation of Pump Stations #[illegible]1, #[illegible], 3[illegible] and renovate Pump Station #13. Site work. [illegible] of gravity and pressure sewers. Supply all labor, materials, equipment [illegible] complete according to plans & specifications. Ross to supply certain materials listed [illegible] sheet #4 which shall become a part of this contract. Further stipulations listed on sheet #5 shall become part of this contract.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] the Owner [illegible] interference or delay to the [illegible]

[illegible] and save harmless the Contractor, the Owner, or other Sub-Contractor [illegible] directly or indirectly, resulting from [illegible] Sub-Contract irrespective of whether fault is the [illegible] of the Owner, Contractor or Sub-Contractors, their officers or employees

[illegible] Contractor [illegible] bond [illegible] to Contractor in the sum of $250,600.00 [illegible] to Contractor for the faithful performance of this subcontract.

[illegible] including but not limited to strikes, picketing, boycotts, and other [illegible] Sub-Contractor [illegible] failure to perform [illegible] the Contractor may, after [illegible] have the right to take the [illegible] under the Contract.

[illegible] of the Sub-Contractor to comply [illegible] with the U. S. Government Safety Regulations

[illegible] in the Contract documents and specifications aforementioned and ____________

[illegible] Federal Register [illegible] Vol. 36, Part II - Safety and Health Regulations for Construction, dated April 17, 1971.

[illegible] Federal Register [illegible] Department of Labor Occupational Safety and Health Administration, dated [illegible]

[illegible] any applicable State or Federal law which has been enacted prior to this date

WHEREAS Contractor agrees to pay to the Sub-Contractor for said work the sum of

Two HUNDRED FIFTY THOUSAND, SIX HUNDRED DOLLARS AND 00/100

DOLLARS ($250,600.00)

[illegible] to be paid by Contractor to the Sub-Contractor [illegible] upon receipt of same by [illegible]

[illegible] of the value of completed work done from month to month [illegible] which are properly stored on the site of the project [illegible] Owner's Certificate provided that at any such time Sub-Contractor has delivered to the [illegible] day of the preceding thirty (30) days an estimate of the work performed during the month by Sub-Contractor [illegible] paragraph for which payment is requested and provided further that the unpaid balance [illegible] in the judgment of the Architect, or Engineer or Contractor to complete the work and to pay any unpaid [illegible] hereunder. It is further understood and agreed that materials stored on the site, for which payment is requested shall not be removed from the site without the written consent of the Contractor. Sub-Contractor shall submit to Contractor [illegible] of payment of [illegible] for material and labor under this contract. The final payment shall be made [illegible] that the work has been done to the satisfaction [illegible] of any lien or claim for which if established Contractor or Owner might become [illegible] the Contractor shall have the right to retain out of any payment due or to become due, an amount [illegible] of all defense [illegible] including [illegible] attorneys fees [illegible] Contractor [illegible] from the Sub-Contractor.

[illegible]

The Contractor and the Sub-Contractor [illegible] successors, executors, administrators and assigns [illegible] the covenants of this agreement.

[illegible] the day and year first written above.

WITNESS

THE [illegible] COMPANY

By Eugene P. Brad[illegible]

SUB-CONTRACTOR

[illegible] CONSTRUCTION CORPORATION

By Thomas E. [illegible]

Page 3 of 3

This page is made a part of the sub-contract agreement between The Beam Company and Newkirk Construction Corporation and will further define the responsibility of the two parties.

1. Beam will supply the following to Newkirk. Newkirk to unload and install same under the terms of the sub-contract.

   Pump Station #13
   2 - Steel Gates
   All pumps, valves and fittings necessary to complete.

   Pump Station #21
   1 - Pump Station per plans.
   24' of 12" reinforced concrete pipe.
   Slide Gate.
   12" flange and flair 90° bends.
   Influent line pipe as necessary.
   Force main pipe as necessary.

   Pump Station #25
   1 - Pump Station per plans.
   24' of 24" concrete pipe.
   24' of 12" concrete pipe.
   Influent line pipe as necessary.
   Force main pipe as necessary.

   Pump Station #32
   1 - Pump Station as per plans.
   Slide Gate.
   3 - 24" flange & flair 90° bends.
   Influent line pipe as necessary.
   Force Main pipe as necessary.

   Beam to furnish and install 24" concrete culvert pipe.

2. Newkirk to supply all labor, material, equipment not mentioned in paragraph #1 of this page which shall include but not be limited to all excavation, sheeting, shoring, pumping, concrete, steel, piping, electrical necessary for a complete job.

THE BEAM COMPANY
BY Pres.

NEWKIRK CONSTRUCTION CORPORATI
BY

SUBCONTRACTOR'S BOND

BOND NO. 43038-35
JAG NO. 43038-35

KNOW ALL MEN BY THESE PRESENTS: That we NEWKIRK CONSTRUCTION CORPORATION Roswell, Georgia (SUBCONTRACTOR) as Principal and DEPENDABLE INSURANCE CO., INC. a corporation duly authorized to do a general surety business in the State of Georgia as Surety, are jointly and severally held and bound unto THE NOAM COMPANY Livonia, Michigan (CONTRACTOR), in the sum of Two Hundred Fifty Thousand, Six Hundred Dollars and 00/100---------------------------Dollars ($ 250,600.00), for the payment of which we jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns firmly by these presents.

THE CONDITION OF THIS BOND IS SUCH THAT:

WHEREAS, said SUBCONTRACTOR, Principal herein, did on the 26th day of May, 19 76, make and enter into a written subcontract with said CONTRACTOR, which subcontract and each and every part thereof is hereby referred to and by this reference made a part hereof, to and with the same full force and effect as if set forth at length herein, and whereby said principal as a SUBCONTRACTOR undertakes among other things to perform certain portions of a contract between the said CONTRACTOR and

CITY OF GULFPORT, MISSISSIPPI, dated

the 26th day of May, 1976 in connection with the construction of

Erection of Pump Station #21,25,32, and
Renovate Pump Station #13 at Gulport, Mississippi.

NOW, THEREFORE, the condition of this obligation is such, that if the Principal shall faithfully perform ne work contracted to be performed and comply with all provisions under said subcontract, and shall pay, r cause to be paid in full, the claims of all persons performing labor upon or furnishing materials to be sed in, or furnishing appliances, equipment or power contributing to such work, then this obligation shall e void, otherwise to remain in full force and effect. The total amount of the surety's liability under this ond shall in no event exceed the penalty hereof.

o right of action or recovery shall accrue hereunder to or for the use of any person or corporation other han the Contractor named herein

rovided, however, as to the Contractor, the right to recovery shall be upon the following express nditions, the performance of which shall be a condition precedent:

irst: That in the event of any default on the part of the Principal, written notice thereof shall be given to the Surety as promptly as possible, and in any event within ten (10) days after the Contractor all become aware of such default, and upon the Contractor's becoming aware of such default no payments ill be made under the said contract without the written consent of the Surety. If the Principal shall andon said contract, or be compelled by the Contractor to cease operations thereunder, the Surety shall [illegible]

Exhibit D

reserves, deferred payments, and other monies provided by said contract to be paid to the Principal, shall be paid to the Surety, at the same times and under the same conditions as by the terms of said contract such monies would have been paid to the Principal had the contract been performed by the Principal, and the Surety shall be entitled thereto in preference to any assignee of the Principal, or any adverse claimant; but if the Contractor shall complete or relet the said contract, all reserves, deferred payments, or other monies remaining after payment for such completion shall be paid to the Surety, or applied as the Surety may direct toward the settlement of any obligation or liability incurred hereunder.

Second: That the contractor shall faithfully perform all of the terms, covenants, and conditions of said contract on the part of the Contractor contracted to be performed. In no event shall payment of payments to Subcontractor from Contractor be in an amount greater than 90% of the value of the work performed by the Subcontractor to the date of such payment. Contractor to retain remaining final payment or payments of 10% of that work to be performed and all reserves or deferred payments for a period of 30 days after completion and acceptance of the total project by the Contractor. Said period to correspond to lien period in which notices of claims or claims of lien by persons performing work or furnishing materials under said contract may be filed, or until all such claims have been paid unless the Surety shall consent, in writing, to the payment of said final payment reserves or deferred payments.

Third: That the Surety shall not be liable for any damages resulting from strikes or labor difficulties, or from mobs, riots, civil commotion, public enemy, fire, the elements, shifting of elements, acts of God, or defect or fault in the plans or specifications referred to in said contract, or for repair, or reconstruction of any work or materials damaged or destroyed by any of said causes; nor for damages arising out of injuries to persons or property or for the death of any person or persons, or under or by virtue of any statutory provision for damages or compensation for injury to or the death of any employee; nor for the infringement or validity of any patent, nor for the efficiency or wearing qualities of any work done or materials furnished or the maintenance thereof or repairs thereto; nor for the furnishing of any bond or obligation other than this instrument.

Fourth: If there be more than one Contractor named in this bond then it is understood that the rights of the Contractors or any of them under this bond are conditioned upon the faithful performance by or on behalf of the owner of all of the conditions of the contract by him to be performed.

Fifth: That no suit, action or proceeding by the Contractor to recover on this bond shall be sustained unless the same be commenced within six months from the completion of said structure or work of improvement, as completed.

Sixth: That the Surety is obligated only to the dollar amount shown on the face of this bond. If any additions or alterations of the original contract, upon which this bond was [illegible] of altering the contract price, Surety is obligated only to the proportional amount that the original contract bears to the altered contract price, unless expressly waived by the Surety in writing.

SIGNED, SEALED AND DATED this Nineteent (19th) day of July, 1976.

Newkirk Construction Corporation
Principal
Thomas E Newkirk
By Thomas E. Newkirk President

DEPENDABLE INSURANCE COMPANY, INC.
Surety
By J. William Rucker
Attorney-in-Fact

DEPENDABLE URANCE COMPANY, INC. POWER OF AT NEY

KNOW ALL MEN BY THESE PRESENTS, That DEPENDABLE INSURANCE COMPANY, INC., a corporation created by and existing under the laws of the State of Florida, having its principal office in the City of Jacksonville, State of Florida, does hereby constitute, determine and appoint

J. WILLIAM RUCKER J. William Rucker

its true and lawful attorney-in-fact, with full power and authority hereby conferred to execute, and to affix thereto the seal of the corporation, as Surety [illegible] FIVE HUNDRED THOUSAND ($500,000) Dollars.

[illegible] DEPENDABLE INSURANCE COMPANY, INC. [illegible] DEPENDABLE INSURANCE COMPANY, INC., and all the acts of said attorney, pursuant to the authority herein given, are hereby ratified and confirmed.

This power of attorney is granted to execute acts of contracting pertaining exclusively to bonds guaranteed by the Small Business Administration under its Surety Bond Guarantee Program, under and by the authority of the following [illegible] paragraphs of ARTICLE VIII of the By-Laws of the Company:

[illegible]

[illegible]

[illegible]

This power of attorney expires on July 1, 1977.

IN WITNESS WHEREOF, DEPENDABLE INSURANCE COMPANY, INC. HAS caused these presents to be signed by its President and its Secretary and its corporate seal to be hereunto affixed, attested by its Secretary, this third day of June 1975.

DEPENDABLE INSURANCE COMPANY, INC.

By: [illegible]
President

Attest: H T Nelson
Secretary

STATE OF FLORIDA
COUNTY OF DUVAL ss

[illegible] C. H. TERRY and H. T. NELSON, to me well known [illegible] DEPENDABLE INSURANCE COMPANY, INC., a corporation, [illegible]

WITNESS my hand and official seal at Jacksonville, State and County aforesaid,

this 3rd day of June 19 75.

Mary Frances Bailey
NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES APRIL 24, 1976

I, the undersigned, Secretary of DEPENDABLE INSURANCE COMPANY, INC., a Florida corporation, DO HEREBY CERTIFY that the above and foregoing Power of Attorney remains in full force and has not been revoked; and, furthermore, that the paragraphs of ARTICLE VIII of the By-Laws of the Corporation and the Resolution of the Board of Directors, as set forth in the Power of Attorney, are now in force.

Signed and Sealed at Jacksonville, Florida, this third day of June 1975.

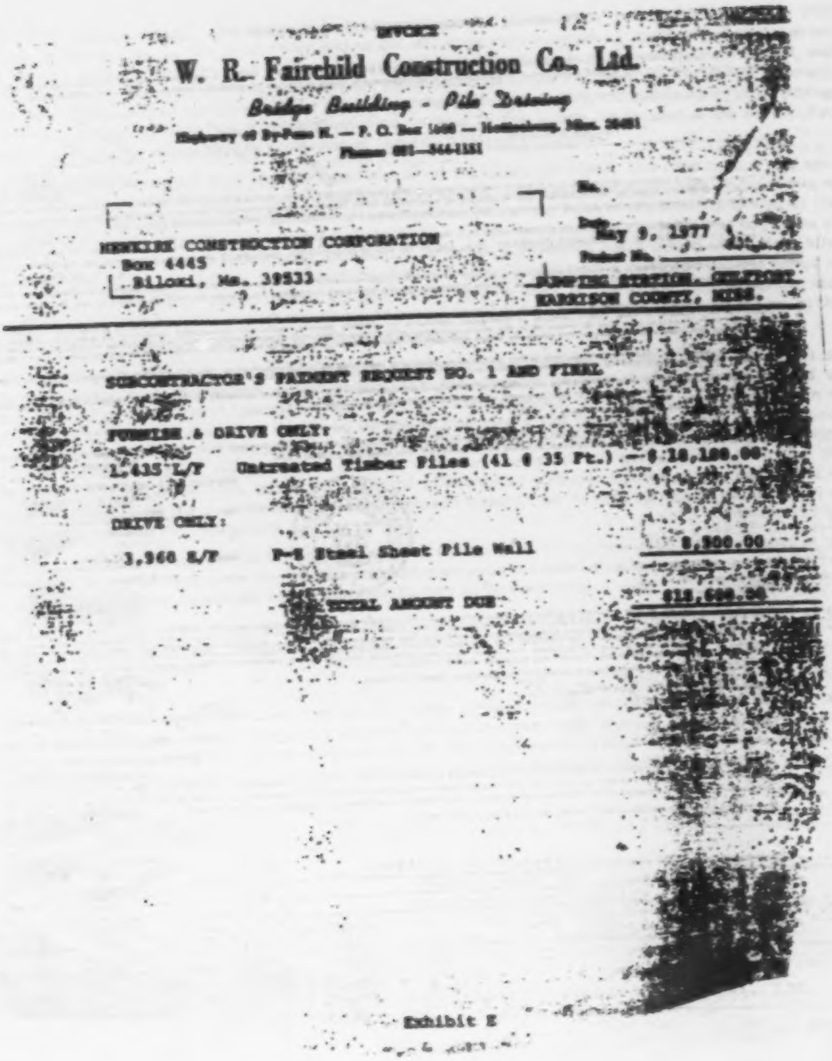
H T Nelson
Secretary

This Power of Attorney executed this Nineteenth (19th) day of July [illegible]

[illegible] The Boan Company

[illegible] Buskirk Construction Corporation [illegible] $250,6[illegible]0.00

[illegible]
Witness



INVOICE

W. R. Fairchild Construction Co., Ltd.

Bridge Building - Pile Driving

Highway 49 By-Pass N. — P. O. Box [illegible] — Hattiesburg, Miss. [illegible]
Phone 601—544-[illegible]

No.

Date May 9, 1977

Project No.

HENKIRK CONSTRUCTION CORPORATION
Box 4445
Biloxi, Ms. 39533

PUMPING STATION, GULFPORT
HARRISON COUNTY, MISS.

SUBCONTRACTOR'S PAYMENT REQUEST NO. 1 AND FINAL

FURNISH & DRIVE ONLY:

1,435 L/F	Untreated Timber Piles (41 @ 35 Ft.)	$ 10,100.00

DRIVE ONLY:

3,960 S/F	P-8 Steel Sheet Pile Wall	8,500.00
	TOTAL AMOUNT DUE	$18,600.00

Exhibit E

STATE OF MISSISSIPPI

COUNTY OF FORREST

THIS DAY personally appeared before me, the undersigned authority at law in and for said county and state, Rodney Fairchild, a general partner of W. R. Fairchild Construction Company, Ltd., who being by me first duly sworn says that the above and foregoing statement of account is true and correct as therein stated, and that the same represents statement of monies owed to W. P. Fairchild Construction Company, Ltd., for materials and labor furnished and incorporated into City of Gulfport Water & Sewer Improvement Program Project No. 3, Interceptor Sewer & Pumping Stations, Northwest Gulfport Area, Project No. C-280-311 contract between City of Gulfport and The Boam Company & Grey Gull Contracting & Engineering Corporation dated October 9, 1975, pursuant to agreement with Newkirk, a subcontractor of Boam, and which labor and materials were furnished between dates of April 18, 1977, and May 9, 1977, and that the sum of $18,600.00 is due, payable, and unpaid thereunder, and that the same is not subject to any offset, credit, or counterclaim, but that the entire amount is now due, owing, payable, and unpaid, and that the said W. P. Fairchild Construction Company, Ltd., is a beneficiary under bonds, Exhibits B and D attached to the Complaint and Counterclaim of W. R. Fairchild Construction Company, Ltd.

RODNEY FAIRCHILD

SWORN TO AND SUBSCRIBED before me on this, the 1st day of August, A. D., 1978.

NOTARY PUBLIC

My Commission Expires:

[illegible]

(SEAL)

There came on for consideration at a meeting of the City Council of the City of Gulfport, Mississippi, held on the 15th day of September, 1977, the following Resolution:

A RESOLUTION FINDING THAT THE BOAM COMPANY
AND GREY GULL CONTRACTING & ENGINEERING
COMPANY, A JOINT VENTURE, PRIME CONTRACTOR
FOR THE CITY OF GULFPORT FOR CONSTRUCTION OF
CERTAIN SEWERAGE AND WATER IMPROVEMENTS HAS
DEFAULTED UNDER THE TERMS OF ITS CONTRACT;
PROVIDING FOR NOTICE OF SUCH DEFAULT TO SUCH
CONTRACTOR AND ITS SURETY; TENDERING THE
COMPLETION OF SUCH CONTRACT TO THE SURETY;
AND AUTHORIZING AND DIRECTING THE MAYOR AND
CLERK OF THE CITY OF GULFPORT TO EXECUTE
A CONTRACT WITH MAGNOLIA CONSTRUCTION COMPANY,
INC., IN THE EVENT THAT SUCH SURETY SHALL FAIL
TO CAUSE SUCH CONTRACT TO BE COMPLETED, AND
FOR RELATED PURPOSES.

WHEREAS, the City of Gulfport, (Owner), entered into a public works contract with The Boam Company and Grey Gull Contracting and Engineering Corporation, as joint venturer (Contracto on October 9, 1975, which provided that Contractor would furnish labor and materials to construct the work described therein within 270 calendar days from the notice to proceed, which was given to Contractor by the Owner on October 17, 1975, which notice fixed June 29, 1976, as the Contract Completion Date; and

WHEREAS, the Aetna Casualty and Surety Company, (Surety) executed a Performance Bond and Payment Bond dated October 9, 1975, in the amount of the contract price of $2,246,198.98, which bonds guaranteed the completion of the contract and payment of all claims of labor, materials or machinery and equipment incorporated in such work; and

WHEREAS, thereafter, Contractor commenced the work, but failed to complete such work on the Contract Completion Date, and after a thorough review of Contractor's claims of late delivery of equipment, delays caused by weather, and for other grounds permitte under the terms of the Contract for extensions of time to complete, Owner and Contractor entered into a Change Order Number Three which extended the Contract Completion Date to January 31, 1977; and

Exhibit F

WHEREAS, Contractor failed to complete such work on suc date, and has now advised the Owner that such work will be complete February 10, 1978; and

WHEREAS, the Owner has been advised, and so finds that various claims are now being asserted by materialmen and suppliers, including, but not limited to:

1.	Mississippi Pump & Equipment Company, Jackson, Mississippi -	$205,000.00
2.	Fairchild Construction Co., Hattiesburg, Mississippi -	18,000.0
3.	Coast Materials, Gulfport, Mississippi -	[illegible],000.0
4.	Thorton Construction Co., Inc. Gulfport, Mississippi -	[illegible]7,625.5
5.	Mississippi Valley Equipment Company, St. Louis, Missouri	44,700.00
	TOTAL	$285,325.50

WHEREAS, Owner has paid Contractor approximately $2,050,000 and has retained approximately $205,000, [illegible] there remain approximately $135,000 of un-disbursed contract funds; and

WHEREAS, Contractor agreed to pay Owner the sum of $250.00 per day for each day Contractor failed to complete such Contract, and Owner is advised and so finds that as of the date of this Resolution, Contractor owes Owner $56,500 in liquidated damages and that such damages will continue to accrue until final completion of such contract; and

WHEREAS, Magnolia Construction Company, [illegible], has offered to furnish all labor and materials necessary to complete Items #1 through #8 of the Technical Specifications to complete [illegible] Stations #25 and #32 for an upset price of $194,000, and to [illegible] additional work and furnish materials for repair, maintenance [illegible] other natur which may be required to restore the work to its [illegible] condition, of a total contract price of $234,000, which work [illegible] completed or before February 10, 1978, and Owner is advised [illegible] finds hat such proposal is fair and reasonable; and

WHEREAS, it appears on the date of this Resolution that a recapitulation of funds on hand and unpaid claims is as follows:

Funds on hand in retainage and undisbursed -		$390,000.00
Liquidated damages to date -	$56,500.00	
Unpaid Claims -	285,325.50	
Cost to Complete (Estimated) -	234,000.00	
Total -	$576,825.50	
Liquidated damages to date of Completion-	37,500.00	
	$614,325.50	
		($614,325.50)
Deficiency		($224,325.50)

WHEREAS, Owner is advised and so finds that the failure of Contractor to complete such work on or before January 31, 1977, has delayed the completion of Water & Sewer Improvement Program of the Northwest Gulfport Area, has resulted in substantial losses of revenue to Owner, and has resulted in a serious hazard to the health, safety and welfare to the citizens of Gulfport, is not the result of delays permitted by the terms of the Contract, but is the result of actual or constructive abandonment of the work by Contractor; and Owner is advised and so finds that Grey Gull Contracting and Engineering Corporation has become insolvent.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND BOARD OF COMMISSIONERS OF THE CITY OF GULFPORT, MISSISSIPPI, AS FOLLOWS:

SECTION I. Without prejudice to any right or remedy accruing or to accrue to Owner, Owner hereby finds, determines, and adjudicates that such contract be, and the same is hereby terminated pursuant to Article 15, Section 15.2 of the Standard General Conditio of such Contract for the following reasons:

A. Contractor's actual or constructive abandonment of work.

B. Contractor's failure to complete the work on or before January 31, 1977.

C. Contractor's failure to pay claims of sub-contractor materialmen, and suppliers.

D. Contractor's failure to furnish Estimated Progress Schedules as provided by Section 2.7 SGC.

E. Contractor's failure to request time extensions under Article 12 of SGC.

F. Insolvency of Grey Gull Contracting and Engineering Corporation.

SECTION 2. The Clerk is hereby directed to cause a certified copy of this Resolution to be mailed, registered or certified with return receipt requested, to Aetna Casualty and Surety Company, c/o Mr. John Stevens, 17th Floor, Detroit Bank and Trust Building, 211 West Fort Street, Detroit, Michigan, 48226, and to Grey Gull Contracting and Engineering Corporation, The Boam Company, Inc., by registered or certified mail, return receipt requested, at 33223 West 7 Mile Road, Livonia, Michigan, 48152, and the date of such termination shall be the eighth day after receipt of such notice by the Surety and Contractor.

SECTION 3. The Clerk is hereby directed to cause a Notice to be published in the Daily Herald, a newspaper having a general circulation in Harrison County, Mississippi, in substantial the following words and figures:

NOTICE OF ABANDONMENT AND TERMINATION OF CONTRACT

TO ALL SUB-CONTRACTORS, LABORMEN, MATERIALMEN AND SUPPLIERS, OF LABOR OR MATERIALS TO:

> THE BOAM COMPANY, INC., AND GREY GULL CONTRACTING & ENGINEERING CORPORATION, A JOINT VENTURE; THE AETNA CASUALTY AND SURETY COMPANY, SURETY:

THE CITY OF GULFPORT, MISSISSIPPI ADJUDICATED THE ABANDONMENT OF A CONTRACT BETWEEN THE BOAM COMPANY, INC., AND GREY GULL CONTRACTIN AND ENGINEERING CORPORATION DATED OCTOBER 9, 1975, FOR WATER AND SEWER IMPROVEMENT PROGRAM, PROJECT NO. 3, INTERCEPTOR SEWER & PUMPING STATIONS, NORTHWEST GULFPORT AREA, PROJECT NO. C-280-311, AND BY RESOLUTION DATED SEPTEMBER 15, 1977, GAVE NOTICE OF SUCH TERMINATION.

ANY PARTIES FURNISHING LABOR OR MATERIALS FOR SUCH WORK SHOULD BRING SUIT AGAINST THE BOAM COMPANY, INC., GREY GULL CONTRACTING AND ENGINEERING CORPORATION, AND THEIR SURETY, AETNA CASUALTY & SURETY COMPANY, WITHIN ONE YEAR FROM THE DATE OF PUBLICATION OF THIS NOTICE; OTHERWISE YOU MAY BE BARRED.

This the 15th day of September, 1977.

Charles L. Walker
CLERK
CITY OF GULFPORT

SECTION 4. If such Surety fails, neglects or refuses to notify the Mayor, in writing, within seven days from the date of receipt of this Resolution that it will undertake completion of such work within a reasonable time, the Mayor and Clerk are hereby authorized and directed to execute a contract with Magnolia Construction Company, Inc., for completion of such work, such contract to be on the Standard Form of Agreement between Owner and Contractor, NSPE 1910-8-A-1, and incorporate Performance and Paymen Bonds in the amount of the Contract and all Standard General Conditions, Special Conditions, Technical Specifications, plans, and other terms and conditions in the original contract, but the contrac completion date, prices, descriptions of work, or other terms applicable to completion of such work shall be in substantial conformity with the proposed Contract between Magnolia Construction Company, Inc., and Grey Gull Contracting & Engineering Corporation and the Boam Company, Inc., dated September 7, 1977, a copy of whic is attached hereto and designated Exhibit "A" to this Resolution, and incorporated herein by reference.

SECTION 5. In the event that such Contract is entered into between Owner and Magnolia Construction Company, Inc., as hereinabove provided, Owner shall pay Magnolia as provided for in such Contract for work heretofore performed for which it has not been paid, and for work performed from the date of such Contract, and Owner shall, upon final completion, pay to Magnolia any retainag due it, and after deducting Owner's costs, expenses, attorneys fees, [illegible] 1978

[illegible] CLERK
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION AT BILOXI

CIVIL ACTION NO. S77-0385(N)

THE BOAM COMPANY and
AETNA CASUALTY AND SURETY COMPANY — PLAINTIFFS

VERSUS

DEPENDABLE INSURANCE COMPANY,
NEWKIRK CONSTRUCTION COMPANY,
CITY OF GULFPORT, and MISSISSIPPI
PUMP AND EQUIPMENT SUPPLY COMPANY, ET AL — DEFENDANTS

ORDER OF INTERVENTION

THIS CAUSE having come on this day for hearing on Motion of Movant, W. R. Fairchild Construction Company, Ltd., a limited partnership organized and existing under the laws of the State of Mississippi and having its principal place of business in the City of Hattiesburg, Forrest County, Mississippi, to intervene in said cause, and the Court having fully considered the same is of the opinion and so finds that the Motion of the said W. R. Fairchild Construction Company, Ltd., is well taken, and that the same should be and is hereby sustained; and it is therefore:

ORDERED that W. R. Fairchild Construction Company, Ltd., a limited co-partnership, be and the same is hereby granted leave to file its Complaint and Counterclaim in substantially the form set forth as exhibit to its Motion for Leave to Intervene.

SO ORDERED this, the 7th day of September, A. D., 1978.

UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION AT BILOXI

CIVIL ACTION NO. S77-0385(M)

THE BOAM COMPANY and
AETNA CASUALTY AND SURETY COMPANY — PLAINTIFFS

VERSUS

DEPENDABLE INSURANCE COMPANY,
NEWKIRK CONSTRUCTION COMPANY,
CITY OF GULFPORT, and MISSISSIPPI
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ORDER OF INTERVENTION

THIS CAUSE having come on this day for hearing on Motion of Movant, W. R. Fairchild Construction Company, Ltd., a limited partnership organized and existing under the laws of the State of Mississippi and having its principal place of business in the City of Hattiesburg, Forrest County, Mississippi, to intervene in said cause, and the Court having fully considered the same is of the opinion and so finds that the Motion of the said W. R. Fairchild Construction Company, Ltd., is well taken, and that the same should be and is hereby sustained; and it is therefore:

ORDERED that W. R. Fairchild Construction Company, Ltd., a limited co-partnership, be and the same is hereby granted leave to file its Complaint and Counterclaim in substantially the form set forth as exhibit to its Motion for Leave to Intervene.

SO ORDERED this, the 7th day of September, A. D., 1978.

UNITED STATES MAGISTRATE

[illegible]
FILED
MAY 4 1979
HARVEY G. HENDERSON, CLERK
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE BOAN COMPANY and AETNA
CASUALTY AND SURETY COMPANY, PLAINTIFFS,

VERSUS CIVIL ACTION NO. S77-0385(N)

DEPENDABLE INSURANCE COMPANY,
NEWKIRK CONSTRUCTION COMPANY,
CITY OF GULFPORT, et al., DEFENDANTS.

ORDER

THIS CAUSE having come on this day on motion of MAGNOLIA CONSTRUCTION COMPANY, INC. to be dismissed as an involuntary party-plaintiff, and the Court having heard argument of counsel and having considered same, finds that such motion is not well taken and should be overruled.

IT IS, THEREFORE, ORDERED that the motion of MAGNOLIA CONSTRUCTION COMPANY, INC. to be dismissed as an involuntary party-plaintiff be, and the same is hereby, overruled.

ORDERED this the 3rd day of May, 1979.

s/ Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

APPROVED:

Attorney for MAGNOLIA CONSTRUCTION
COMPANY, INC.

TRUE COPY, I HEREBY CERTIFY.
HARVEY G. HENDERSON, CLERK
BY:
Deputy Clerk

STYLE OF CASE:
Civil Action No. S77-0385(N)
The Boam Co., et al
v.
Dependable Insurance Co., et al

DIVISION:
Southern

APPEARANCES:

FOR PLAINTIFF(S):
Harry R. Allen
Gail Crowell
P.O. Box 4108
Gulfport, MS 39501

FOR DEFENDANTS:
Larry L. Lenoir
P.O. Box 4272
Gulfport, MS 39501

George M. Morse
P.O. Drawer 100
Gulfport, MS 39501

Pete Carrubba
P.O. Drawer W
Gulfport, MS 39501

HEARING ON /X/

1. Motion of Magnolia Construction Co. to Be Dismissed as an Involuntary Party-Plaintiff
2. Motions of Plaintiffs for Summary Judgment Against Thornton & MS Valley Equipment's Counterclaims

PRE-TRIAL: Hours Minutes X MOTION: Hours 50 Minutes

TRIAL: COURT /___/ Hrs. Mins. JURY /___/ Hrs. Mins.

Issue Joined: 10-2-78

PLACE OF HOLDING COURT: Biloxi, Mississippi
JUDGE(S) PRESIDING: Honorable Walter L. Nixon, Jr.
COURT REPORTER: May 3, 1979
DATE(S)

ACTION TAKEN:

1. Granted.
2. Taken Under Advisement. Intervenors given 5 days to reply to Plaintiffs' reply brief, then plaintiffs will have 5 days thereafter to respond.

R. Capuar
DEPUTY CLERK

MISSISSIPPI
FILED
FEB 13 1979
HARVEY G. HENDERSON, CLERK
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE BOAM COMPANY and AETNA
CASUALTY AND SURETY COMPANY, PLAINTIFFS

VS. CIVIL ACTION NO. S77-0385(N)

DEPENDABLE INSURANCE COMPANY and
NEWKIRK CONSTRUCTION CORPORATION, DEFENDANTS

JUDGMENT

THIS CAUSE, having come on this day on Motion of Mississippi Valley Equipment Company for Default Judgment against Newkirk Construction Corporation, Defendant, and the Court having considered same, finds that the Motion of Mississippi Valley Equipment Company is well taken and should be sustained.

It is, therefore, ORDERED that Mississippi Valley Equipment Company, Complainant, recover from the Defendant, Newkirk Construction Corporation, the sum of Nineteen Thousand Eight Hundred Eighty-three and 82/100 Dollars ($19,883.82).

It is further ORDERED that this Default Judgment in no way affects the rights of Dependable Insurance Company, The Boam Company and Aetna Casualty and Surety Company as between each other, and as regards the Amended Complaint filed by Mississippi Valley Equipment Company in this Cause, and in no way alters priorities set forth by law, and all such issues are reserved for hearing in further proceedings.

ORDERED, this 12th day of February, 1979.

Walter L. Nixon Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY.
HARVEY C. HENDERSON, CLERK
BY:
Deputy Clerk

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
FEB 13 1979
HARVEY G. HENDERSON, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE BOAM COMPANY and AETNA
CASUALTY AND SURETY COMPANY, PLAINTIFFS

VS. CIVIL ACTION NO. S77-0385(N)

DEPENDABLE INSURANCE COMPANY,
NEWKIRK CONSTRUCTION COMPANY,
CITY OF GULFPORT, et al., DEFENDANTS

JUDGMENT

THIS CAUSE, having come on this day on Motion of Thornton Construction Company, Inc., for default judgment against Newkirk Construction Corporation, Defendant, and the Court having considered same, finds that the Motion of Thornton Construction Company, Inc. is well taken and should be sustained.

It is, therefore, ORDERED that Thornton Construction Company, Inc., Complainant, recover of the Defendant, Newkirk Construction Corporation, the sum of Nine Thousand Six Hundred Fifty-two and 50/100 Dollars ($9,652.50).

It is further ORDERED that this Default Judgment in no way affects the rights of Dependable Insurance Company, The Boam Company and Aetna Casualty and Surety Company as between each other and as regards the Amended Complaint filed by Thornton Construction Company, Inc. in this cause, and in no way alters priorities set forth by law, and all such issues are reserved for hearing in further proceedings.

ORDERED, this the 12th day of February, 1979.

Walter L. Nixon Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY,
HARVEY G. HENDERSON, CLERK
BY:
J. Simpson
Deputy Clerk

EXHIBIT 3 (a)

LAW OFFICES OF
DANIEL, COKER, HORTON, BELL AND DUKES
[illegible]
SECURITY SAVINGS BUILDING
[illegible]
GULFPORT, MISSISSIPPI [illegible]

GULFPORT OFFICE:
WILLIAM F. DUKES
FORREST W. STRINGFELLOW
[illegible]

JACKSON OFFICE:
JOE H. DANIEL
CURTIS E. COKER
FRANK C. HORTON
THOMAS A. BELL
[illegible]
THOMAS H. SUTTLE, JR.
ROGER C. CLAPP
JACKSON H. ABLES, III
[illegible]
C. MICHAEL ELLINGBURG
JAMES F. STEEL
TERRY R. LEVY
[illegible]
ROBERT S. ADDISON
[illegible]
WALTER W. DUKES

May 23, 1979

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 24 1979
HARVEY G. HENDERSON, CLERK
BY DEPUTY

Mrs. Verta Lee Swetman
Deputy Clerk
United States District Court
P.O. Box 369
Biloxi, Mississippi 39533

Re: The Boam Company, et al.
vs.
Dependable Insurance Company, et al.
No. S77-0385(N)
Our File: C-1044

Dear Mrs. Swetman:

I enclose for filing in the above entitled and numbered cause original and copy each of Notice of Motion and of Motion for Judgment on the Pleadings, Or In The Alternative For Summary Judgments On Behalf Of Dependable Insurance Company each against the following:

1. ABC Rental, Inc.
2. Mississippi Valley Equipment Company
3. Crown Equipment Company
4. Thornton Construction Company, Inc.
5. Florida Steel Corporation
6. W. R. Fairchild Construction Company, Ltd.
7. Southland Steel, Inc.;

all being filed in behalf of Dependable Insurance Company, one of the Defendants. A copy of this filing is being mailed to each of the below named interested attorneys.

By separate cover letter we are mailing to the Honorable Walter L. Nixon, Jr., United States District Judge, a memorandum brief in support of the aforesaid Motions. Copies of the above filing with the Honorable Walter L. Nixon, Jr., United States District

Judge, are also being mailed to the below named interested attorneys.

Sincerely yours,

DANIEL,COKER,HORTON,BELL AND DUKES

Pete H Carrubba, rms

PETE H. CARRUBBA

PHC:rms

Enclosures

cc: Hon. Walter L. Nixon, Jr.
U.S. District Judge

Hon. Richard B. Graves
Hon. R. David Kaufman
Hon. Phillip C. Kelly
Hon. Hassel Whitworth
Hon. Stanford Morse
Mr. Tom Newkirk
Hon. Tommy Dulin
Hon. George M. Morse
Hon. Joe Sam Owen
Hon. Bruce C. Aultman
Hon. T. Glover Roberts
Hon. Harry Allen
Hon. Gail A. Crowell
Hon. Larry Lanoir

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 24 1979
[illegible], CLERK
DEPUTY
BY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE BOAM COMPANY AND GREY GULL
CONTRACTING & ENGINEERING CORPORATION

PLAINTIFFS

VS.

CIVIL ACTION NO. S77-0385(N)

DEPENDABLE INSURANCE COMPANY AND
NEWKIRK CONSTRUCTION CORPORATION

DEFENDANTS

W. R. FAIRCHILD CONSTRUCTION COMPANY,
LTD.

INTERVENOR

MOTION FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT ON BEHALF OF DEPENDABLE INSURANCE COMPANY AGAINST INTERVENOR W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD.

Comes now DEPENDABLE INSURANCE COMPANY, one of the Defendants in the above styled and numbered cause, pursuant to the Federal Rules of Civil Procedures, and moves this Court to grant a judgment on the pleadings in favor of this Defendant, or in the alternative to grant a summary judgment in favor of this Defendant, dismissing the action by W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD., in this cause.

In support of this Motion this Defendant would show unto the Court that the Complaint of W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD., fails to state a claim upon which relief can be granted as against DEPENDABLE INSURANCE COMPANY and that there is not genuine issue as to any material fact and that this Defendant is entitled to a judgment in its favor as against W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD., as a matter of law.

This Motion is based upon the following documents and pleadings:

(a) The Amended Complaint of the Boam Company and Aetna Casualty and Surety Company filed in this cause;

(b) The Answer of Dependable Insurance Company to the Amended Complaint of the Boam Company and Aetna Casualty and Surety Company filed in this cause;

(c) The Complaint of W. R. Fairchild Construction Company, Ltd., filed in this cause;

(d) The Answer of Dependable Insurance Company to Complaint and Counterclaim of W. R. Fairchild Construction Company, Ltd.

Copies of these documents and pleadings are enclosed.

Respectfully submitted,

DEPENDABLE INSURANCE COMPANY, Defendant

BY: DANIEL, COKER, HORTON, BELL AND DUKES

BY: ____________________________
PETE H. CARRUBBA, Of Counsel

DANIEL, COKER, HORTON, BELL AND DUKES
901 Security Savings Building
Post Office Drawer W
Gulfport, Mississippi 39501
Telephone: (601) 868-1111
Attorneys for Dependable Insurance Company

CERTIFICATE

I, Pete H. Carrubba of the law firm of Daniel, Coker, Horton, Bell and Dukes do hereby certify that I have this date mailed a copy of the above and foregoing Motion by United States Mail, with postage fully prepaid, to the following attorneys at their respective mailing addresses listed below.

HON. RICHARD B. GRAVES
GRAVES, RILEY, MEADOWS & WALKER
P. O. Drawer 550
Gulfport, MS 39501

HON. E. DAVID KAUFMAN
BRUNINI, GRANTHAM, GROWER & HEWES
P. O. Drawer 119
Jackson, MS 39205

HON. PHILLIP C. KELLY
KELLY, HARSH & KELLY
123 Public Square
Gallatin, TN 37066

HON. HASSEL WHITWORTH
WATKINS & EAGER
P. O. Box 650
Jackson, MS 39205

HON. STANFORD MORSE
WHITE AND MORSE
P. O. Drawer 100
Gulfport, MS 39501

MR. TOM NEWKIRK
NEWKIRK CONSTRUCTION CORPORATION
P. O. Box 728
Roswell, GA 300

HON. LARRY LENOIR
P. O. Box 4272
Gulfport, MS 39501

HON. TOMMY DULIN
P. O. Box 820
Gulfport, MS 39501

HON. GEORGE M. MORSE
WHITE AND MORSE
P. O. Drawer 100
Gulfport, MS 39501

HON. JOE SAM OWEN
P. O. Box 673
Gulfport, MS 39501

HON. BRUCE C. AULTMAN
AULTMAN, AULTMAN AND TYNER
P. O. Drawer 750
Hattiesburg, MS 39401

HON. T. GLOVER ROBERTS
ROBERTS & WARREN
P. O. Box 1506
Gulfport, MS 39501

HON. HARRY ALLEN
BRYAN, NELSON, ALLEN AND SCHROEDER
P. O. Drawer 4108
Gulfport, MS 39501

HON. GAIL A. CROWELL
BRYAN, NELSON, ALLEN AND SCHROEDER
P. O. Drawer 4108
Gulfport, MS 39501

This 3rd day of May, 1979.

PETE H. CARRUBBA

FILED

MAY 24 [illegible]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

THE ROAN COMPANY AND GREY GULL
CONTRACTING & ENGINEERING CORPORATION

PLAINTIFFS

VS.

CIVIL ACTION NO. S7[illegible]-0386(N)

DEPENDABLE INSURANCE COMPANY AND
NEWKIRK CONSTRUCTION CORPORATION

DEFENDANTS

W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD.

INTERVENOR

NOTICE OF MOTION

TO: HON. BRUCE C. AULTMAN
Aultman, Aultman & Tyner
P. O. Drawer 750
Hattiesburg, MS 39401

HON. GAIL A. CROWELL
HON. HARRY ALLEN
Bryan, Nelson, Allen & Schroeder
P. O. Box 1108
Gulfport, MS 39501

HON. R. DAVID KAUFMAN
Brunini, Grantham, Grower & Hewes
P. O. Drawer 119
Jackson, MS 39205

HON. PHILLIP C. KELLY
Kelly, Harsh & Kelly
123 Public Square
Gallatin, TN 37066

HON. HASSELL H. WHITWORTH
Watkins & Eager
P. O. Box 650
Jackson, MS 39205

MR. TOM NEWKIRK
Newkirk Construction Corp.
P. O. Box 728
Roswell, GA 30077

HON. STANFORD MORSE
White and Morse
P. O. Box 100
Gulfport, MS 39501

HON. T. GLOVER ROBERTS
Graves, Riley, Meadows & Walke
P. O. Drawer 550
Gulfport, MS 39501

HON. LARRY LENOIR
P. O. Box 4272
Gulfport, MS 39501

HON. TOMMY DULIN
P. O. Box 820
Gulfport, MS 39501

HON. GEORGE M. MORSE
White and Morse
P. O. Box 100
Gulfport, MS 39501

HON. JOE SAM OWEN
P. O. Box 673
Gulfport, MS 39501

HON. GEORGE M. [illegible]
White and Morse
P. O. Box 100
Gulfport, MS [illegible]

PLEASE TAKE NOTICE that the Defendant and Cross-[illegible], Dependable Insurance Company, will bring the attached [illegible] Motion for hearing before the Honorable Walter L. Nixon, [illegible] United States District Judge for the Southern District of Mississippi, Southern Division of the Southern District Court in the Post Office and Federal Building at Biloxi, Mississippi, at 9:30 o'clock a.m., on Tuesday, June 5, 1979 or as soon thereafter as counsel can be heard.

THIS the ____ day of May, 1979.

Respectfully submitted,

DEPENDABLE INSURANCE COMPANY, Defendant

BY: ______________________________

PETE H. CARRUBBA, Of Counsel

DANIEL, COKER, HORTON, BELL AND DUKES
901 Security Savings Building
Post Office Drawer W
Gulfport, Mississippi

Telephone: (601) 868-1111
Attorneys for Dependable Insurance Company

CERTIFICATE

I, Pete H. Carrubba of the law firm of Daniel, Coker, Horton, Bell and Dukes, do hereby certify that I have this date mailed by United States Mail, with postage fully prepaid, a true and correct copy of the above and foregoing Notice of Motion to the following:

HON. GAIL A. CROWELL
HON. HARRY ALLEN
Bryan, Nelson, Allen & Schroeder
P. O. Box 1108
Gulfport, MS 39501

HON. R. DAVID KAUFMAN
Brunini, Grantham, Grower & Hewes
P. O. Drawer 119
Jackson, MS 39205

HON. JOE SAM OWEN
P. O. Box 673
Gulfport, MS 39501

HON. RICHARD B. GRAVES
Graves, Riley, Meadows & Walker
P. O. Drawer 550
Gulfport, MS 39501

HON. LARRY LENOIR
P. O. Box 4272
Gulfport, MS 39501

HON. TOMMY DULIN
P. O. Box 820
Gulfport, MS 39501

HON. PHILLIP C. KELLY
Kelly, Harsh & Kelly
123 Public Square
Gallatin, TN 37066

HON. HASSELL H. WHITWORTH
Watkins & Eager
P. O. Box 650
Jackson, MS 39205

MR. TOM NEWKIRK
Newkirk Construction Corp.
P. O. Box 728
Roswell, GA 30077

HON. BRUCE C. AULTMAN
Aultman, Aultman & Tyner
P. O. Drawer 750
Hattiesburg, MS 39401

HON. STANFORD MORSE
White and Morse
P. O. Box 100
Gulfport, MS 39501

HON. T. GLOVER ROBERTS
Roberts & Warren
P. O. Box 1506
Gulfport, MS 39501

HON. GEORGE M. MORSE
White and Morse
P. O. Box 100
Gulfport, MS 39501

This the _____ day of May, 1979.

PETE H. CARRUBBA

STYLE OF CASE:
Civil Action No. S77-0385(N)
The Boam Co., et al
v.
Dependable Insurance Co., et al

DIVISION: Southern

APPEARANCES:

Gail A. Crowell
P.O. Drawer 4108
Gulfport, MS 39501

James B. Galloway
P.O. Drawer H
Gulfport, MS 39501

Richard B. Graves
P.O. Drawer 550
Gulfport, MS 39501

Bruce Aultman
P.O. Drawer 750
Hattiesburg, MS 39401

Gaston Hewes, Jr.
P.O. Box 673
Gulfport, MS 39501

Pete Carrubba
P.O. Drawer W
Gulfport, MS 39501

George M. Morse
P.O. Drawer 100
Gulfport, MS 39501

Tommy Dulin
P.O. Box 820
Gulfport, MS 39501

T. Glover Roberts
P.O. Box 1506
Gulfport, MS 39501

Larry L. Lenoir
P.O. Box 4272
Gulfport, MS 39501

PRE-TRIAL: Hours Minutes   X **MOTION:** Hours 10 Minutes

TRIAL: COURT ☐ Hrs. Mins.   JURY ☐ Hrs. Mins.

ISSUE JOINED: 3-14-79

PLACE OF HOLDING COURT: Biloxi, Mississippi
JUDGE(S) PRESIDING: Honorable Walter L. Nixon, Jr.
COURT REPORTER:
DATE(S): June 5, 1979

ACTION TAKEN:

No Pretrial held. Continued on July calendar. Case to be referred to Judge Roper.

R. Capuano
DEPUTY CLERK

STYLE OF CASE:

The Boam Company, et al.
v.
Dependable Insurance Company. et al.
S77-0385(N)

DIVISION:

Southern

APPEARANCES:
FOR PLAINTIFF(S):

Harry R.Nelson
Gail A. Crowell

FOR DEFENDANT(S):

Pete H. Carrubba
Bruce C. Aultman
Larry Lenoir
Richard B. Graves
George M. Morse
Tommy Dulin
Gaston Hewes
Jim Galloway
Glover Roberts

HEARING ON:

Pre-Trial Conference

PRE-TRIAL: 1 Hours 30 Minutes MOTION: Hours Minu

TRIAL: COURT Hrs. ins. JURY Hrs. Mins.

ISSUES JOINED:

PLACE OF HOLDING COURT: Biloxi, Miss.
JUDGE(S) PRESIDING: John M. Roper
COURT REPORTER:
DATE(S) 6-5-79

ACTION TAKEN:

1. Tuntative trial date set for July 9, 1979 on issues involving all parties except the intervenors, however intervenors allowed to participate if they so choose. Estimated time of trial 3 days.

2. Pre-trial order due by July 2, 1979.

3. Court noted it would consider motions for summary judgment on behalf of Dupundable Insurance Co. against the intervenors and also the motion for summary judgment on behalf of Boam and Aetna against Miss. Valley Equip. and Thornton Construction. The District Judge may decided these motions.

DEPUTY CLERK:

Michael W. McPhail

FILED
JUN [illegible] 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE BOAM COMPANY, ET AL,	PLAINTIFFS
VS.	CIVIL ACTION NO. S77-0385(N)
DEPENDABLE INSURANCE COMPANY, ET AL,	DEFENDANTS
MAGNOLIA CONSTRUCTION COMPANY, INC., VS.	PLAINTIFF
CITY OF GULFPORT, MISSISSIPPI,	DEFENDANT

ORDER TO DISBURSE FUNDS DEPOSITED INTO THE REGISTRY OF THE COURT

This cause came on to be heard on Motion of MAGNOLIA CONSTRUCTION COMPANY, IN., for an Order directing the Clerk of the Court to disburse funds deposited into the Registry of the Court by the Defendant, CITY OF GULFPORT, and the Court having heard and considered the same finds that the Motion is well taken and should be sustained. It is therefore,

ORDERED and ADJUDGED that the Clerk of the Court be, and he is hereby ordered and directed to pay and disburse to MAGNOLIA CONSTRUCTION COMPANY, INC., and LARRY L. LENOIR, Attorney, P. O. Box 4272, Gulfport, Mississippi, from the monies held by him in the Registry of the Court the sum of $33,292.66 having heretofore been tendered and deposited in the Registry of the Court by the Defendant, CITY OF GULFPORT, and such disbursement shall not in any way be to the prejudice of the rights of any of the parties to this cause nor to the rights of Movant as to any additional sums so claimed against the Defendant, CITY OF GULFPORT.

ORDERED and ADJUDGED on this the 8th day of June, 1979.

[illegible] Nixon, Jr.
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

ATTORNEY FOR CITY OF GULFPORT

ATTORNEY FOR THE BOAM COMPANY and
AETNA CASUALTY AND SURETY COMPANY

ATTORNEY FOR DEPENDABLE INSURANCE COMPANY

Richard B. [illegible]
ATTORNEY FOR FLORIDA STEEL CORPORATION

A TRUE COPY, I HEREBY CERTIFY.
HARVEY G. HENDERSON, CLERK
BY:
Deputy Clerk

[illegible]

FILED

JUN 14 1979

HARVEY G. HENDERSON, CLERK
DEPUTY
BY ___

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE BOAM COMPANY AND AETNA CASUALTY AND SURETY COMPANY — PLAINTIFFS

VERSUS — CIVIL ACTION NO. S77-0385 (N)

DEPENDABLE INSURANCE COMPANY, NEWKIRK CONSTRUCTION COMPANY, CITY OF GULFPORT AND MISSISSIPPI PUMP AND EQUIPMENT COMPANY — DEFENDANTS

VERSUS

HYDRO-SYSTEMS, INC. — THIRD-PARTY DEFENDANT

ORDER

This day this cause came to be heard on the motion of the Third-Party Defendant and Counterclaimant, Hydro-Systems, Inc., to dismiss its counterclaim against The Boam Company and Aetna Casualty and Surety Company and after being advised in the premises, the Court is of the opinion that said motion should be sustained.

It is therefore ordered and adjudged that the counterclaim of Hydro-Systems, Inc. against The Boam Company and Aetna Casualty and Surety Company be and the same is hereby dismissed with prejudice at cost to the Third-Party Defendant, Counterclaimant.

Ordered and adjudged this 13th day of June, 1979.

s/ Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

AGREED AS TO FORM AND CONTENT:

HYDRO-SYSTEMS, INC.,
Third-Party Defendant and Counterclaimant

By: BRUNINI, GRANTHAM, GROWER & HEWES

By: R. David Kaufman
R. David Kaufman

THE BOAM COMPANY
AETNA CASUALTY AND SURETY COMPANY

By: BRYAN, NELSON, ALLEN, SCHROEDER & COBB

By: Gail A. Crowell
Gail A. Crowell

A TRUE COPY, I HEREBY CERTIFY.
HARVEY G. HENDERSON, CLERK
BY:
Deputy Clerk

FILED
JUN 14 1979
HARVEY G. HENDERSON, CLERK
BY ___ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE BOAM COMPANY AND AETNA
CASUALTY AND SURETY COMPANY

PLAINTIFFS

VERSUS

CIVIL ACTION NO.
S77-0385 (N)

DEPENDABLE INSURANCE COMPANY, NEWKIRK
CONSTRUCTION COMPANY, CITY OF GULFPORT
AND MISSISSIPPI PUMP AND EQUIPMENT COMPANY

DEFENDANTS

VERSUS

HYDRO-SYSTEMS, INC.

THIRD-PARTY
DEFENDANT

ORDER

This day this cause came on to be heard on the motion of the Plaintiffs, The Boam Company and Aetna Casualty and Surety Company, and the Defendant and Counterclaimant, Mississippi Pump and Equipment Company, to dismiss the complaint filed by The Boam Company and Aetna Casualty and Surety Company against Mississippi Pump and Equipment Company and to dismiss the counterclaim filed by Mississippi Pump and Equipment Company against The Boam Company and Aetna Casualty and Surety Company, and after being fully advised in the premises, the Court is of the opinion that said motion should be sustained.

It is therefore ordered and adjudged that the complaint filed by The Boam Company and Aetna Casualty and Surety Company against Mississippi Pump and Equipment Company be and the same is hereby dismissed with prejudice at cost to the Plaintiffs and that the counterclaim filed by Mississippi Pump and Equipment Company against The Boam Company and Aetna Casualty and Surety Company is hereby dismissed with prejudice at cost to the Plaintiffs.

[illegible] Ordered and adjudged this 13th day of June, 1979.

s/ Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

AGREED AS TO FORM AND CONTENT:

THE BOAM COMPANY
AETNA CASUALTY AND SURETY COMPANY
By: BRYAN, NELSON, ALLEN, SCHROEDER & COBB
By: Gail A. Crowell
Gail A. Crowell

MISSISSIPPI PUMP AND EQUIPMENT COMPANY
By: WATKINS & EAGER
By:

[illegible] HARVEY G. [illegible]
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JUN 20 1979
[illegible] G. [illegible], CLERK
DEPUTY
BY

THE BOAM COMPANY AND AETNA CASUALTY & SURETY COMPANY	PLAINTIFFS
VS.	CIVIL ACTION NO. S77-0385(N)
DEPENDABLE INSURANCE COMPANY, NEWKIRK CONSTRUCTION COMPANY, CITY OF GULFPORT AND MISSISSIPPI PUMP AND EQUIPMENT COMPANY	DEFENDANTS
VS.	
HYDRO-SYSTEMS, INC.	THIRD-PARTY DEFENDANT

ORDER

This day this cause came on to be heard on the Joint Motion of Mississippi Pump and Equipment Company, Defendant and Third-Party Plaintiff, and Hydro-Systems, Inc., Third-Party Defendant, to dismiss the Third-Party Complaint filed by Mississippi Pump and Equipment Company against Hydro-Systems, Inc., and to dismiss the Counterclaim filed by Hydro-Systems, Inc., against Mississippi Pump and Equipment Company, and after being fully advised in the premises, the Court is of the opinion said Motion is well taken and should be sustained.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Third-Party Complaint filed by Mississippi Pump and Equipment Company against Hydro-Systems, Inc., be and the same is hereby dismissed with prejudice at cost to the Third-Party Plaintiff and that the Counterclaim filed by Hydro-Systems, Inc., against Mississippi Pump and Equipment Company be and is hereby dismissed with prejudice at cost to the Third-Party Defendant.

ORDERED AND ADJUDGED, this 19th day of June, 1979.

s/ Walter L. Nixon, Jr.

UNITED STATES DISTRICT JUDGE

AGREED AS TO FORM AND CONTENT:

MISSISSIPPI PUMP AND EQUIPMENT COMPANY

WATKINS & EAGER

By: Hassell H. Whitworth
Hassell H. Whitworth

HYDRO-SYSTEMS, INC.

BRUNINI, GRANTHAM, GROWER & HEWES

By: R. David Kaufman
R. David Kaufman

A TRUE COPY, I HEREBY CERTIFY.
HARVEY G. HENDERSON, CLERK
BY:
Deputy Clerk

EXHIBIT 3 (b)

FILED
JUL 9 1979
HARVEY G. HENDERSON, CLERK
BY ______ DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE BOAM COMPANY, ET AL PLAINTIFFS

vs. CIVIL ACTION NO. S77-0385(N)

DEPENDABLE INSURANCE COMPANY ET AL DEFENDANTS

ORDER OF REFERENCE AND STIPULATION OF CONSENT TO TRIAL OF NON-JURY CASE BY UNITED STATES MAGISTRATE

Undersigned counsel are fully aware of the right of trial of the captioned proceeding before a District Judge of the United States District Court for this District, and on behalf of their clients do hereby specifically waive trial before the District Judge and consent to this reference of the trial before a United States Magistrate, and specifically authorize entry of a final decision by the United States Magistrate, with a judgment in in accordance therewith entered by the District Judge, if appropriate, upon review of the proceedings.

THIS the 2nd day of July, 197 79.

Attorney for Boam Company

Attorney for Dependable Insurance Corp

Larry L. Lemon
Attorney for Magnolia Const. Co.

Attorney for [illegible]

O R D E R

IT IS ORDERED that this matter be referred to Honorable John M. Roper, United States Magistrate, for trial in accordance with the foregoing stipulation.

THIS the 9th day of July, 1979.

Walter L. Nixon Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY.
HARVEY G. HENDERSON, CLERK
BY:
Deputy Clerk

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
AUG 9 1979
HARVEY C. HENDERSON, CLERK
BY ______ DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE SOAM COMPANY, ET AL PLAINTIFFS

Vs. CIVIL ACTION NO. S77-0385(N)

DEPENDABLE INSURANCE COMPANY, ET AL DEFENDANTS

ORDER

This matter having come before the Court on the Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment, against W. R. Fairchild Construction Company, Ltd., and the Court being fully advised, finds that the motion is not well taken and the resolution of the issues presented thereby should await a full hearing on the merits in this case.

Accordingly, the Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment, is hereby denied.

THIS the 8th day of August, 1979.

Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY.
HARVEY C. HENDERSON, CLERK
BY:
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

FILED
AUG 9 1979
HARVEY G. HENDERSON, CLERK
BY DEPUTY

THE BOAM COMPANY, ET AL PLAINTIFFS

VS. CIVIL ACTION NO. S77-0385(N)

DEPENDABLE INSURANCE COMPANY, ET AL DEFENDANTS

ORDER

This matter having come before the Court on the Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment, against ABC Rental Inc., and the Court being fully advised, finds that the motion is not well taken and the resolution of the issues presented thereby should await a full hearing on the merits in this case.

Accordingly, the Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment, is hereby denied.

THIS the 9th day of August, 1979.

Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY.
HARVEY G. HENDERSON, CLERK
BY:

Deputy Clerk

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
AUG 9 1979
HENDERSON, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE BOAM COMPANY, ET AL PLAINTIFFS

VS. CIVIL ACTION NO. S77-0385(N)

DEPENDABLE INSURANCE COMPANY, ET AL DEFENDANTS

ORDER

This matter having come before the Court on the Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment, against Southland Steel, Inc., and the Court being fully advised, finds that the motion is not well taken and the resolution of the issues presented thereby should await a full hearing on the merits in this case.

Accordingly, the Motion of Dependable Insurance Company for Judgment on the Pleadings, or in the Alternative for Summary Judgment, is hereby denied.

THIS the 8th day of August, 1979.

Walter L. Nixon Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY.
HARVEY G. HENDERSON, CLERK
BY:
Deputy Clerk

STYLE OF CASE: DIVISION: Southern

The Boam Company and Aetna
Casualty and Surety Company
vs.
Dependable Insurance Company
Newkirk Construction Corporation,
City of Gulfport, et al.
S77-0385(N)

APPEARANCES:
FOR PLAINTIFF(S): FOR DEFENDANT(S):

Gail Crowell Leonard Blackwell

HEARING ON:

Plaintiffs' motion to strike counterclaim of Defendant, Newkirk Constructi
Corporation.

PRE-TRIAL: Hours Minutes MOTION: Hours 30 Minute

TRIAL: COURT Hrs. ins. JURY Hrs. Mins.

ISSUES JOINED:

PLACE OF HOLDING COURT: Biloxi, Ms.
JUDGE(S) PRESIDING: John M. Roper
COURT REPORTER:
DATE(S) August 20, 1979

ACTION TAKEN:

The Court granted Plaintiffs' motion to strike the counterclaim. No award of attorney's fees.

DEPUTY CLERK: Michael W. McPhail

STYLE OF CASE: DIVISION: Southern

The Boam Company and Aetna
Casualty and Surety Company
vs.
Dependable Insurance Company,
Newkirk Construction Corporation,
City of Gulfport, et al.
S77-0385(N)

APPEARANCES:

FOR PLAINTIFF(S):	FOR DEFENDANT(S):
Gail Crowell	Pete Carrubba Leonard Blackwell George M. Morse

HEARING ON:

Defendant Newkirk Construction Company's motion to set aside entry of default.

PRE-TRIAL: Hours Minutes **MOTION**: 1 Hours 25 Minute

TRIAL: COURT Hrs. ins. JURY Hrs. Mins.

ISSUES JOINED:

PLACE OF HOLDING COURT: Biloxi, Miss.
JUDGE(S) PRESIDING: John M. Roper
COURT REPORTER:
DATE(S) August 9, 1979

ACTION TAKEN:

1. All pending motions for summary judgment have been denied.
2. The Court granted Newkirk's motion to set aside and vacate an entry of default against Newkirk entered by Boam and Aetna on 5-11-78.
   - -Newkirk's answer to the complaint of Boam and Aetna is due within 7 days from 8-9-79.
   - -Newkirk to pay reasonable costs incurred by Boam and Aetna with regard to entry of default.
3. The Court granted Newkirk's motion to set aside and vacate an entry of default against Newkirk entered by Dependable on 4-13-78.
   - -Newkirk's answer to Dependable's cross-claim is due within 7 days from 8-9-79.
   - -Dependable and Newkirk allowed 45 days for discovery, with right to seek additional time if necessary.
   - -Newkirk to pay reasonabe costs incurred by Dependable with regard to entry and setting aside of default.
4. This cause will be bifurcated and the claims between Dependable and Newkirk will be heard on a date to be set by the Court subsequent to the hearing on August 27, 1979.

DEPUTY CLERK: Michael W. McPhail

SOUTHERN DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
NOV 19 1979
HARVEY C. HENDERSON, CLERK
BY DEPUTY

STYLE OF CASE:

The Boam Company, et al.
vs.
Dependable Insurance Company, et al.
S77-0385(N)

APPEARANCES:
FOR PLAINTIFF(S):

Harry R. Allen and
Gail Crowell for
 The Boam Company
 Grey Gull Contracting & Engineering Corporation
 Aetna Casualty & Surety Company
 E.P. Brady, Inc.
 E.P. Brady, Individually

Larry Lenoir for
 Magnolia Construction Company

FOR DEFENDANT(S):

Pete Carrubba for
 Dependable Insurance Comp

Stanford Morse for
 The City Of Gulfport

Leonard A. Blackwell and
James B. Ritchie for
 Newkirk Construction Co.

FOR INTERVENOR(S):

George M. Morse for
 Mississippi Valley Equipment Company
 Thornton Construction Company, Inc.

Dorrance Aultman for
 W.E. Fairchild Construction Company, Ltd.

Richard Graves for
 Florida Steel Corporation

Tommy Dulin for
 ABC Rental, Inc.

Herman F. Cox for
 Southland Steel Corporati

Glover Roberts for
 Crown Equipment Company

Jim Galloway for
 Coast Materials Company
 Moretrench American Corporation
 Glazer Steel Corporation

HEARING ON: TRIAL (Non-Jury)

TRIAL: COURT 8 hours 10 minutes

PLACE OF HOLDING COURT: Biloxi, Miss.
JUDGE PRESIDING: Honorable John M. Roper
COURT REPORTER: David Scott, P.O. Box 2202, Jackson, Ms. 39205
DATE(S): August 27, 28 and 29, 1979

ACTION TAKEN:

Court found that Magnolia Construction Company was entitled to recover from the City of Gulfport $1,250.00 together with costs.
The remaining parties agreed as follows:
(See next page)

For and in consideration of the payments to be made hereunde and other mutual benefits to the parties hereto, all parties agre as follows:

PAYMENT:

Dependable Insurance Company will pay the sum of Two Hundred Fifty-Three Thousand One Hundred Dollars ($253,100.00) into the Registry of the Court to be disbursed in the manner hereinafter set forth.

Newkirk Construction Company will pay the sum of Two Thousan Five Hundred Dollars ($2,500.00) into the Registry of the Court t be included in the disbursement set forth below.

DISBURSEMENT:

1. Twenty Seven Thousand Dollars ($27,000.00) payable to the City of Gulfport and Sanford Morse, attorney.

2. Seven Thousand Four Hundred Eighty Dollars ($7,480.00) payable to Mississippi Valley Equipment Company, and George M. Morse, attorney.

3. Three Thousand Eight Hundred Eighty Dollars ($3,880.00) payable to Thornton Construction Company, Inc. and George M. Morse, attorney.

4. Seventeen Thousand Dollars ($17,000.00) payable to W. R. Fairchild Construction Company, Ltd. and Dorrance Aultman, attorney.

5. One Hundred Ninety Thousand Dollars ($190,000.00) payable to E. P. Brady, Inc., assignee of the Boam Company and Harry R. Allen, attorney.

6. Four Thousand Four Hundred Seventy-Three Dollars and Two Cents ($4,473.02) payable to Florida Steel Corporation and Richard Graves, attorney.

7. Ninety-Nine Dollars and Nineteen Cents ($99.19) payable to ABC Rental, Inc. and Tommy Dulin, attorney.

8. Five Hundred Seventeen Dollars and Ninety-Eight Cents ($517.98) payable to Southland Steel Corporation and Joe Sam

Owen, attorney.

9. One Thousand One Hundred Sixty-Fvie Dollars and Ninety-Nine Cents ($1,165.99) payable to Crown Equipment Company and Glover Roberts, attorney.

10. One Thousand Eight Hundred Forty-One Dollars and Sixty Cents ($1,841.60) payable to Coast Materials and Jim Galloway, attorney.

11. One Thousand Five Hundred Thirty-Two Dollars and Thirty-Seven Cents ($1,532.37) payable to Moretrench American Corporation and Jim Galloway, attorney.

12. Six Hundred Nine Dollars and Eighty-Five Cents ($609.85) payable to Glazer Steel Corporation and Jim Galloway, attorney.

Documents will be executed as follows:

1. A General Release will be executed in favor of the City by Bradys, Aetna, Grey Gull and E. P. Brady, Inc., as assignee on behalf of Boam.

2. A General Release will be executed by the City in favor of Boam, Grey Gull, E. P. Brady, Inc., E. P. Brady, individually and Aetna.

3. A Covenant Not To Sue will be executed by E. P. Brady, Inc., E. P. Brady, individually, E. P. Brady, Inc. as assignee on behalf of Boam, Grey Gull and Aetna, in favor of Dependable. Said parties will also execute an assignment in favor of Dependable of any and all claims against Newkirk arising out of the subject sub-contract with Boam-Grey Gull for Project Number 3 in construction of certain pump stations for the City of Gulfport.

4. A Covenant Not To Sue from Dependable in favor of Boam, Grey Gull, E. P. Brady, Inc., E. P. Brady, individually, and Aetna

5. Intervenors Thornton, Mississippi Valley and Florida will execute Covenants Not To Sue in favor of all parties except Newkirk.

6. Intervenors ABC, Southland, Crown, Coast Materials, Moretrench, Glazer and Fairchild will execute a General Release

in favor of all parties, including Newkirk.

7. Except for those parties executing General Releases in favor of Newkirk, all parties reserve all claims, defenses and rights of whatever description against Newkirk.

8. As part of this consideration hereinbefore mentioned, Boam and Aetna hereby agree to dismiss with prejudice their claim against the City in the cause of action now pending in the United States District Court, Southern District of Mississippi, Southern Division, styled "The Boam Company, et al versus Dependable Insurance Company, et al, Civil Action Number S77-0385(N)".

9. Boam and Aetna will file a Motion to Dismiss Without Prejudice against Dependable and Newkirk, fully reserving all claims, defenses and rights of whatever description against Newkirk.

10. Dependable will file a Motion to Dismiss Without Prejudice its cross claim against Newkirk, fully reserving all claims, defenses and rights of whatever description against Newkirk, including but not limited to those set out in the general indemnity agreement in favor of Dependable.

GREY GULL CONTRACTING & ENGINEERING CORPORATION

BY: ______________________
HARRY R. ALLEN, ITS ATTORNEY

THE BOAM COMPANY

BY: ______________________
HARRY R. ALLEN, ITS ATTORNEY

AETNA CASUALTY & SURETY COMPANY

BY: ______________________
HARRY R. ALLEN, ITS ATTORNEY

[illegible]
FILED
SEP 7 1979
HARVEY G. HENDERSON, CLERK
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE UOAM COMPANY and AETNA
CASUALTY & SURETY COMPANY — PLAINTIFFS

VERSUS — CIVIL ACTION
NO. S77-0385(N)

DEPENDABLE INSURANCE COMPANY,
NEWKIRK CONSTRUCTION CORPORATION,
CITY OF GULFPORT, ET AL — DEFENDANTS

JUDGMENT

THIS TRIAL coming on the 27th day of August, 1979, and the parties having waived trial by jury, and the Court having heard and considered oral and documentary evidence and argument of counsel, and having entered Findings of Fact and Conclusions of Law which are incorporated herein by referenced, orders and adjudges as follows:

IT IS ORDERED and ADJUDGED that Magnolia Construction Company do have and recover from the City of Gulfport the sum of $1,230.00, together with costs.

ORDERED and ADJUDGED this the 6th day of September, 1979.

UNITED STATES MAGISTRATE

Walt L. Nixon Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY.
HARVEY G. [illegible], CLERK
BY:
Deputy Clerk

EXHIBIT 3 (c)

THE BOAM COMPANY and AETNA CASUALTY & SURETY COMPANY
vs.
DEPENDABLE INSURANCE COMPANY, NEWKIRK CONSTRUCTION
CORPORATION, CITY OF GULFPORT, ET AL   CIVIL ACTION NO. S77-0385(N)

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
SEP 7 1979
[illegible], CLERK
BY [illegible] DEPUTY.

STATE OF MISSISSIPPI

COUNTY OF HARRISON

SETTLEMENT AGREEMENT

This agreement entered into this 29th day of AUGUST, 1979, by and between the parties as follows:

Grey Gull Contracting and Engineering Corporation (hereinafter called Gray Gull)

The Boam Company (hereinafter called Boam), plaintiff;

Aetna Casualty & Surety Company (hereinafter called Aetna) plaintiff;

E. P. Brady, Inc. and E. P. Brady, individually (hereinafter called Bradys);

Dependable Insurance Company (hereinafter called Dependable) defendant;

City of Gulfport (hereinafter called City), defendant;

Florida Steel Corporation (hereinafter called Florida), intervenor;

ABC Rental (hereinafter known as ABC), intervenor;

Southland Steel Corporation (hereinafter called Southland), intervenor;

Crown Construction Company (hereinafter called Crown), intervenor;

Coast Materials Company (hereinafter known as Coast), intervenor;

Moretrench American Corporation (hereinafter known as Moretrench), intervenor;

Glazer Steel Corporation, (hereinafter known as Glazer), intervenor,

Mississippi Valley Equipment Company (hereinafter known as Mississippi Valley), intervenor;

Thornton Construction Company, Inc. (hereinafter known as Thornton), intervenor;

W. R. Fairchild Construction Company, Ltd. (hereinafter known as Fairchild), intervenor.

For and in consideration of the payments to be made hereunder and other mutual benefits to the parties hereto, all parties agree as follows:

PAYMENT:

Dependable Insurance Company will pay the sum of Two Hundred Fifty-Three Thousand One Hundred Dollars ($253,100.00) into the Registry of the Court to be disbursed in the manner hereinafter set forth.

Newkirk Construction Company will pay the sum of Two Thousand Five Hundred Dollars ($2,500.00) into the Registry of the Court to be included in the disbursement set forth below.

DISBURSEMENT:

1. Twenty Seven Thousand Dollars ($27,000.00) payable to the City of Gulfport and Sanford Morse, attorney.

2. Seven Thousand Four Hundred Eighty Dollars ($7,480.00) payable to Mississippi Valley Equipment Company, and George M. Morse, attorney.

3. Three Thousand Eight Hundred Eighty Dollars ($3,880.00) payable to Thornton Construction Company, Inc. and George M. Morse, attorney.

4. Seventeen Thousand Dollars ($17,000.00) payable to W. R. Fairchild Construction Company, Ltd. and Dorrance Aultman, attorney.

5. One Hundred Ninety Thousand Dollars ($190,000.00) payable to E. P. Brady, Inc., assignee of the Boam Company and Harry R. Allen, attorney.

6. Four Thousand Four Hundred Seventy-Three Dollars and Two Cents ($4,473.02) payable to Florida Steel Corporation and Richard Graves, attorney.

7. Ninety-Nine Dollars and Nineteen Cents ([illegible]) payable to ABC Rental, Inc. and Tommy Dulin, attorney.

8. Five Hundred Seventeen Dollars and Ninety-Eight Cents ($517.98) payable to Southland Steel Corporation and [illegible]

Owen, attorney.

9. One Thousand One Hundred Sixty-Fvie Dollars and Ninety-Nine Cents ($1,165.99) payable to Crown Equipment Company and Glover Roberts, attorney.

10. One Thousand Eight Hundred Forty-One Dollars and Sixty Cents ($1,841.60) payable to Coast Materials and Jim Galloway, attorney.

11. One Thousand Five Hundred Thirty-Two Dollars and Thirty-Seven Cents ($1,532.37) payable to Moretrench American Corporation and Jim Galloway, attorney.

12. Six Hundred Nine Dollars and Eighty-Five Cents ($609.85) payable to Glazer Steel Corporation and Jim Galloway, attorney.

Documents will be executed as follows:

1. A General Release will be executed in favor of the City by Bradys, Aetna, Grey Gull and E. P. Brady, Inc., as assignee on behalf of Boam.

2. A General Release will be executed by the City in favor of Boam, Grey Gull, E. P. Brady, Inc., E. P. Brady, individually and Aetna.

3. A Covenant Not To Sue will be executed by E. P. Brady, Inc., E. P. Brady, individually, E. P. Brady, Inc. as assignee on behalf of Boam, Grey Gull and Aetna, in favor of Dependable. Said parties will also execute an assignment in favor of Dependable of any and all claims against Newkirk arising out of the subject sub-contract with Boam-Grey Gull for Project Number 3 in construction of certain pump stations for the City of Gulfport.

4. A Covenant Not To Sue from Dependable in favor of Boam, Grey Gull, E. P. Brady, Inc., E. P. Brady, individually, and Aetna

5. Intervenors Thornton, Mississippi Valley and Florida will execute Covenants Not To Sue in favor of all parties except Newkirk.

6. Intervenors ABC, Southland, Crown, Coast Materials, Moretrench, Glaser and Fairchild will execute a General Release

in favor of all parties, including Newkirk.

7. Except for those parties executing General Releases in favor of Newkirk, all parties reserve all claims, defenses and rights of whatever description against Newkirk.

8. As part of this consideration hereinbefore mentioned, Boam and Aetna hereby agree to dismiss with prejudice their claim against the City in the cause of action now pending in the United States District Court, Southern District of Mississippi, Southern Division, styled "The Boam Company, et al versus Dependable Insurance Company, et al, Civil Action Number S77-0385(N)".

9. Boam and Aetna will file a Motion to Dismiss Without Prejudice against Dependable and Newkirk, fully reserving all claims, defenses and rights of whatever description against Newkirk.

10. Dependable will file a Motion to Dismiss Without Prejudice its cross claim against Newkirk, fully reserving all claims, defenses and rights of whatever description against Newkirk, including but not limited to those set out in the general indemnity agreement in favor of Dependable.

GREY GULL CONTRACTING & ENGINEERING CORPORATION

BY: ______________________
HARRY R. ALLEN, ITS ATTORNEY

THE BOAM COMPANY

BY: ______________________
HARRY R. ALLEN, ITS ATTORNEY

AETNA CASUALTY & SURETY COMPANY

BY: ______________________
HARRY R. ALLEN, ITS ATTORNEY

E. P. BRADY, INC.

BY: ______________________
HARRY R. ALLEN, ITS ATTORNEY

E. P. BRADY, INDIVIDUALLY

BY: ______________________
HARRY R. ALLEN, ITS ATTORNEY

DEPENDABLE INSURANCE COMPANY

BY: ______________________
PETE CARUBBA, ITS ATTORNEY

THE CITY OF GULFPORT

BY: ______________________
STANFORD MORSE, ITS ATTORNEY

MISSISSIPPI VALLEY EQUIPMENT COMPANY

BY: ______________________
GEORGE M. MORSE, ITS ATTORNEY

THORNTON CONSTRUCTION COMPANY, INC.

BY: ______________________
GEORGE M. MORSE, ITS ATTORNEY

W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD.

BY: ______________________
[illegible] AULTMAN, ITS ATTORNEY

FLORIDA STEEL CORPORATION

BY: ______________________
RICHARD GRAVES, ITS ATTORNEY

ABC RENTAL, INC.

BY: ______________________
TOMMY DULIN, ITS ATTORNEY

SOUTHLAND STEEL CORPORATION

BY: F. Cox
HERMAN F. COX ITS ATTORNEY

CROWN EQUIPMENT COMPANY

BY: Glover Roberts
GLOVER ROBERTS, ITS ATTORNEY

COAST MATERIALS COMPANY

BY:
JIM GALLOWAY, ITS ATTORNEY

MORETRENCH AMERICAN CORPORATION

BY:
JIM GALLOWAY, ITS ATTORNEY

GLAZER STEEL CORPORATION

BY:
JIM GALLOWAY, ITS ATTORNEY

APPROVED:

THIS the 6th day of September, 1979.

UNITED STATES MAGISTRATE

UNITED STATES DISTRICT JUDGE

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
OCT 12 1979
HARVEY G. HENDERSON, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE BOAM COMPANY, ET AL PLAINTIFFS

VERSUS CIVIL ACTION NO: S77-0385(N)

DEPENDABLE INSURANCE COMPANY, ET AL DEFENDANTS

DISBURSEMENT ORDER

Pursuant to the Settlement Agreement entered into on the 29th day of August, 1979 by and between the following parties:

Grey Gull Contracting & Engineering Corporation
The Boam Company
Aetna Casualty & Surety Company
E. P. Brady, Inc., and E. P. Brady, individually
Dependable Insurance Company
City of Gulfport
Florida Steel Corporation
ABC Rental
Southland Steel Corporation
Crown Construction Company
Coast Materials Company
Moretrench American Corporation
Glazer Steel Corporation
Mississippi Valley Equipment Company
Thornton Construction Company, Inc.
W. R. Fairchild Construction Company, Ltd.,

and Dependable Insurance Company having paid into the registry of the Court $253,100.00, and Newkirk Construction Company having paid into the registry of the Court, $2,500.00, the Clerk of the Court is hereby authorized and directed to disburse said money paid into the registry of the Court as follows:

1. **Twenty Seven Thousand Dollars ($27,000.00) payable to the City of Gulfport and Stanford Morse, attorney.**

2. **Seven Thousand Four Hundred Eighty Dollars ($7,480.00), payable to Mississippi Valley Equipment Company and George M. Morse, attorney.**

3. **Three Thousand Eight Hundred Eighty Dollars ($3,880.00), payable to Thornton Construction Company, Inc., and George M. Morse, attorney.**

4. **Seventeen Thousand Dollars ($17,000.00), payable to W. R. Fairchild Construction Company, Ltd., and Dorrance Aultman, attorney.**

5. **One Hundred Ninety Thousand Dollars ($190,000.00), payable to E. P. Brady, Inc., assignee of the Boam Company and Harry R. Allen, attorney.**

6. **Four Thousand Four Hundred Seventy-Three Dollars and Two Cents ($4,473.02), payable to Florida Steel Corporation and Richard Graves, attorney.**

7. **Ninety-Nine Dollars and Nineteen Cents ($99.19), payable to ABC Rental, Inc., and Tommy Dulin, attorney.**

8. **Five Hundred Seventeen Dollars and Ninety-Eight Cents ($517.98), payable to Southland Steel Corporation and Joe Sam Owen, attorney.**

9. **One Thousand One Hundred Sixty-Five Dollars and Ninety-Nine Cents ($1,165.99), payable to Crown Construction Company and Glover Roberts, attorney.**

10. **One Thousand Eight Hundred Forty-One Dollars and Sixty Cents ($1,841.60), payable to Coast Materials and Jim Galloway, attorney.**

11. **One Thousand Five Hundred Thirty-Two Dollars and Thirty Seven Cents ($1,532.37), payable to Moretrench American Corporation and Jim Galloway, attorney.**

12. Six Hundred Nine Dollars and Eighty-Five Cents ($609.85), payable to Glazer Steel Corporation and Jim Galloway, attorney.

ORDERED AND ADJUDGED this 12th day of Oct., 1979.

Walter L. Nixon Jr.
UNITED STATES DISTRICT JUDGE

RECOMMENDED AND APPROVED BY:

UNITED STATES MAGISTRATE

A TRUE COPY, I HEREBY CERTIFY.
LARRY J. HENDERSON, CLERK
BY:

Deputy Clerk

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
SOUTHERN DISTRICT OF MISSISSIPPI

DIVISIONS AND OFFICES
Jackson at Jackson [illegible]
Hattiesburg at Hattiesburg [illegible]
Southern at Biloxi [illegible]
Eastern at Meridian [illegible]
Western at Vicksburg [illegible]

Jackson, Mississippi
October 31, 1979

Mr. Bruce Aultman
Aultman, Aultman & Tyner
Post Office Drawer 750
Hattiesburg, Mississippi 39401

Dear Mr. Aultman:

Re: The Boam Company, et al
v.
Dependable Ins. Co., etc.
Civil No. S77-0385(N)

Pursuant to Order of this Court filed and entered on October 12, 1979, I am enclosing the following check:

Check No. 1671 in the amount of $17,000.00 dated 10-31-79 payable to W. R. Fairchild Construction Company, Ltd., and Dorrance Aultman, Attorney.

Sincerely,

Harvey G. Henderson, Clerk

Bobbie J. Price, Chief Deputy

bp

encl.

LAW OFFICES OF
DANIEL, COKER, HORTON, BELL AND DUKES
SUITE 800
SECURITY SAVINGS BUILDING
[illegible] P. O. DRAWER W
GULFPORT, MISSISSIPPI 39501

GULFPORT OFFICE
WILLIAM F. DUKES
FORREST W. STRINGFELLOW
DONALD V. BURCH
PETE H. CARRUBBA
WALTER W. DUKES

JACKSON OFFICE:
JOE H. DANIEL
CURTIS E. COKER
FRANK C. HORTON
THOMAS A. BELL
JOHN H. ROACH
JOHN B. CLARK
THOMAS SUTTLE, JR.
ROGER C. CLAPP
JACKSON H. ABLES, III
JOEL W. HOWELL, III
C. MICHAEL ELLINGBURG
JAMES F. STEEL
TERRY R. LEVY
G. STEVENS HAZARD
ROBERT S. ADDISON
ALAN G. CAMERON
MICHAEL L. KNAPP
LARRY D. MOFFETT

December 19, 1979

Honorable John M. Roper
Unites States Magistrate
P.O. Drawer 1164
Biloxi, Mississippi 39533

UNITED STATES MAGISTRATE
DEC 21 RECD
RECEIVED

Re: #S77-0385(N) U. S. District Court
Southern District of Mississippi,
Southern Division
The Boam Company, et al.
vs.
Dependable Insurance Company, et al.
Our File: C-1044

Dear Judge Roper:

I enclose the following Orders approved by respective counsel of involved parties as to each:

1. Order of Dismissal of claim of The Boam Company and Aetna Casualty and Surety Company, approved by Harry Allen for Plaintiffs and myself for Dependable Insurance Company. Original and 4 copies.

2. Order of Dismissal of claim of Dependable Insurance Company and Newkirk Construction Corporation as to each other without prejudice, approved by Leonars A. Blackwell, for Newkirk and myself for Dependable. Original and 4 copies.

3. Order of Dismissal of claim of Intervenor, Mississippi Valley Equipment Company, without prejudice, approved by George M. Morse for Intervenor and myself for Dependable. Original and 4 copies.

4. Order of Dismissal of claim of Intervenor, Thornton Construction Company, Inc., without prejudice, approved by George M. Morse, for Intervenor and myself for Dependable. Original and 4 copies.

5. Order of Dismissal with prejudice of claim of Intervenor, Coast Materials, Inc., approved by Jim Galloway, for Intervenor, Leonard A. Blackwell, III, for Newkirk and myself for Dependable. Original and 5 copies.

[illegible]

6. Order of Dismissal with prejudice of claim of Intervenor, Glazier Steel Corporation, approved by Jim Galloway for Intervenor, Leonard A. Blackwell, III for Newkirk and myself for Dependable. Original and 5 copies.

7. Order of Dismissal with prejudice of claim of Intervenor, Moretrench American Corporation, approved by Jim Galloway for Intervenor, Leonard A. Blackwell, III for Newkirk and myself for Dependable. Original and 5 copies.

I am awaiting similar orders to be returned to me from respective attorneys for Southland Steel Corporation, W. R. Fairchild Construction Company, Ltd., Crown Construction Company, Florda Steel Corporation and ABC Rental, Inc., and will forward same to you as soon as I review them, upon filing of which the case may be removed from your docket.

Respectfully yours,

Pete H. Carrubba
For the Firm

PHC:skf
enc.

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JAN 30 1980
HARVEY G. HENDERSON, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE HOAM COMPANY and
AETNA CASUALTY AND SURETY COMPANY — PLAINTIFFS

VERSUS — CIVIL ACTION NO. S77-0385(N)

DEPENDABLE INSURANCE COMPANY, ET AL. — DEFENDANTS

CROWN CONSTRUCTION COMPANY — INTERVENOR

ORDER OF DISMISSAL WITH PREJUDICE

The above cause came on to be heard upon Motion of the Intervenor, Crown Construction Company, for an order of dismissal with prejudice of its claim in intervention on the ground that a just and adequate settlement has been had on the claims; and the Court, upon due deliberation therefor having found that said Motion is well taken and should be sustained, it is therefore

ORDERED AND ADJUDGED that the claim of the intervenor, Crown Construction Company, be, and the same hereby is, dismissed with prejudice, with each party to pay its own cost.

ORDERED AND ADJUDGED this the 30th day of January, 1980.

UNITED STATES MAGISTRATE

UNITED STATES DISTRICT JUDGE

APPROVED:

T. GLOVER ROBERTS,
Attorney for Crown Construction
Company

PETE H. CARRUBBA,
Attorney for Dependable Insurance
Company

LEONARD A. BLACKWELL, II,
Attorney for Newkirk Construction
Corporation

Deputy Clerk

[illegible]
FILED
JAN 30 1980
[illegible] CLERK
DEPUTY
BY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE BOAM COMPANY and
AETNA CASUALTY AND SURETY COMPANY — PLAINTIFFS

VERSUS — CIVIL ACTION NO. S77-0385(N)

DEPENDABLE INSURANCE COMPANY, ET AL. — DEFENDANTS

FLORIDA STEEL CORPORATION — INTERVENOR

ORDER OF DISMISSAL

This cause coming on this day to be heard on Motion Ore Tenus by Florida Steel Corporation and Dependable Insurance Company to dismiss the claim of Florida Steel Corporation as to Dependable Insurance Company, asserted in the above entitled and numbered cause, without prejudice, and upon showing unto the Court that said claim had been compromised and settled, and on oral and documentary evidence, the Court, having heard and considered the same, finds that the Motion to Dismiss is well taken and should be sustained. It is therefore,

ORDERED AND ADJUDGED that the claim of intervention of Florida Steel Corporation, as to Dependable Insurance Company, asserted in the above entitled and numbered cause, be, and the same hereby is, dismissed without prejudice.

ORDERED AND ADJUDGED this the 30th day of January, 1980.

UNITED STATES MAGISTRATE

APPROVED:

RICHARD B. GRAVES,
Attorney for Florida Steel
Corporation

UNITED STATES DISTRICT JUDGE

PETE H. CARRUBBA,
Attorney for Dependable
Insurance Company

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JAN 30 1980
HARVEY G. HENDERSON, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THE BOAN COMPANY and
AETNA CASUALTY AND SURETY COMPANY PLAINTIFFS

VERSUS CIVIL ACTION NO. S77-0383(N)

DEPENDABLE INSURANCE COMPANY, ET AL. DEFENDANTS

W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD. INTERVENOR

ORDER OF DISMISSAL WITH PREJUDICE

The above cause came on to be heard upon Motion of the Intervenor, W. R. Fairchild Construction Company, Ltd., for an order of dismissal with prejudice of its claim in intervention on the ground that a just and adequate settlement has been had on the claims; and the Court, upon due deliberation therefor having found that said Motion is well taken and should be sustained, it is therefore

ORDERED AND ADJUDGED that the claim of the intervenor, W. R. Fairchild Construction Company, Ltd., be, and the same hereby is, dismissed with prejudice, with each party to pay its own cost.

ORDERED AND ADJUDGED this the 30th day of January, 1980.

UNITED STATES MAGISTRATE

Walter L. Nixon Jr.
UNITED STATES DISTRICT JUDGE

APPROVED:

DORRANCE AULTMAN,
Attorney for W. R. Fairchild
Construction Company, Ltd.

PETE N. CARRUBBA,
Attorney for Dependable Insurance
Company

LEONARD A. BLACKWELL, II,
Attorney for Newkirk Construction
Corporation

A TRUE COPY, I HEREBY CERTIFY.
HARVEY G. HENDERSON, CLERK
BY:
Deputy Clerk

EXHIBIT 4

DIST.	OFF.	DOCKET YR	DOCKET NUMBER	FILING DATE MO.	DAY	YEAR	J	N/S	O	D		R ID	DEMAND $ (NEAREST $1,000)	OTHER	[illegible]	JURY DEM.	DOCKET YR NUM
38	1	80	0274	02	13	80	3	340	1	1	2		6,196		3804 ~~3803~~	P	S80-0274

PLAINTIFFS

JACK H. SEYMOUR, JR.

DEFENDANTS

L & A CONTRACTING COMPANY, ~~M. R.~~
~~FAIRCHILD CONSTRUCTION COMPANY, INC.~~ per order 9/3/80
GULF COAST PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE, INC.
AND RAY SIMS, SR.
and
Brown Engineers, Inc. (2-25-80)

CONSOLIDATED WITH S80-0359(H)

CAUSE

46 U.S.C.A. Section 688 - Jones Act - Negligence.
(without prepayment of fees or costs)

ATTORNEYS

Joe Sam Owen
P. O. Box 673
Gulfport, Ms. 39501
868-2821

Bobby O'Barr
O'Barr and Hurlbert
P. O. Box 541
Biloxi, Ms. 39533
435-5536

~~George E. Morse~~
~~White & Morse~~
~~P. O. Drawer 100~~
~~Gulfport, Ms. 39501~~
~~863-9831~~
~~(M.R.Fairchild Constr.Co.)~~
Per Order 9-3-80

James Carroll
Gelpi, Sullivan, Carroll & Laborde
Suite 934, One Shell Square
New Orleans, La. 70139
(504) 524-9714

Eldon L. Bolton, Jr.
P. O. Box 4077
Gulfport, Ms. [illegible]01
864-5863
(L&A Contracting Co.
Gulf Coast Pre-Stress Co.,
Ray Sims) (Moody Bros.)

~~[illegible]~~
~~Bryant & Stennis~~
~~P. O. Box 10~~
~~Gulfport, Ms. [illegible]~~
~~863-[illegible]~~
~~(MOODY BROTHERS OF JACKS~~

Page, Mannino & Peres
(Fred Mannino) Dolcam
P.O. Drawer 289
Biloxi, Ms. 39533
(Brown Engineers)

DATE	NR.	PROCEEDINGS
2-13-80		COMPLAINT, [illegible] [illegible] [illegible], filed. (without prepayment of costs), filed.
2-13-80		Interrogatories to L & A Contracting Company, original and 1 copy, filed.
2-13-80		Interrogatories addressed to W. R. Fairchild Construction Co., Ltd., original a copy, filed.
2-13-80		Interrogatories addressed to Gulf Coast Pre-Stress Co., Inc., original and 1cop filed.
2-13-80		Interrogatories addressed to Moody Brothers of Jacksonville, Inc., original and copy, filed
2-13-80		Interrogatories addressed to Ray Sims, Sr., original and 1 copy, filed.
2-13-80		Request of plaintiff for production and inspection - Gulf Coast Pre-Stress Co., original and 1 copy, filed.
2-13-80		Request of Plaintiff for production and inspection - Moody Brothers of Jacksonv Inc., original and 1 copies, filed.
2-13-80		Request of Plaintiff for Production and inspection - Ray Sims, Sr., original and copy, filed.
2-13-80		Request of Plaintiff for Production and Inspection - W. R. Fairchild Constructio Co., Ltd., original and 1 copy, filed.
2-13-80		Request of Plaintiff for Production and Inspection - L & A Contracting Co., orig and 1 copy, files.
2-13-80		Summons issued, original and 6 copies, copies having attached copies of complain all Interrogatories and all request for admissions and mailed to U. S. Marshal fo service.
2-25-80		Amended Suit under the Jones Act, original and 7 copies, filed.
2-25-80		Request of Jack Seymour, Jr. for production and inspection, orig. & 1 copy, file
2-25-80		Amended Summons issued, original and 7 copies, copies having attached copies of above plead. and mailed to U. S. Marshal for service, filed.
2-25-80		Interrogatories addressed to Brown Engineers, Inc., original and 1 copy, filed (attached also to Amended Summons)
-26-80		Motion of Defendant for Summary Judgment or for alternative relief, with certifica of service, with attachments, filed.
-26-80		NOTICE that above motion be heard before Judge Russell on 4-7-80 at 9 AM in Gulfp Ms.,
3-5-80		Letter from Secy of State with attached receipt showing that process was receiv by Moody Brothers of Jacksonville, Inc. on 2-19-80, filed.
[illegible]		Marshal's return on summons, executed as to Gulf Coast Pre-Stress Co., Inc., L & Contracting Co., Ray Sims, Sr. and W. R. Fairchild Construction Co., Ltd. on 2-21- and as to Moody Brothers of Jacksonville, Inc. by service on Secy of State on 2-1 filed.
3-7-80		Letter from Eldon L. Bolton, Jr. associating with counsel from New Orleans, date 3-6-80), filed.

S80-0274(R) N
Page 2

DC 111A
Rev. 1/75

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
JACK N. SEYMOUR, JR.	L & A CONTRACTING CO., et al	DOCKET NO. ____ PAGE 2 OF ____ P.

DATE	NR	PROCEEDINGS
3-10-80		Marshal's return on summons, executed as to Moody Brothers of Jacksonville, Gulf Coast Pre-Stress Co., Inc., L & A Contracting Co., Ray Sims, Sr. on 2-26-80 and as to W. R. Fairchild Construction Co., Ltd. on 2-26-80 and as t Brown Engineers, Inc. on 3-5-80, filed.
3-12-80		Letter from Secy of State with attached receipt showing that process was rece by Moody Brothers of Jacksonville, Inc. by service on Charles Anderson on 2-29-80, filed.
3-13-80		Motion of L & A Contracting Co., Gulf Coast Pre-Stress Co. and Ray Sims, Sr. extension of time to answer, with certificate of service, filed. (Order mailed to Judge Roper for signature)
3-13-80		ORDER - L & A Contracting Co., Gulf Coast Pre-Stress Company and Ray Sims, Sr granted an additional 20 days up to and including 4-7-80, filed and entered in 1980, page 733. Copies to attorneys.
3-14-80		Motion for Enlargement of Time of Moody Brothers of Jacksonville, Inc., with certificate of service, filed. (Agreed Order to Judge Roper)
3-14-80		ORDER - Moody Brothers of Jacksonville, Inc. allowed 30 days additional time f 3-14-80 to file responsive pleadings, filed and entered in OB-1980, page 740. Copies to attorneys.
3-25-80		Motion of Brown Engineers, Inc. for enlargement of time, with certificate c service, filed. (AGREED ORDER TO JUDGE ROPER FOR SIGNATURE)
3-25-80		This cause reassigned to Judge Nixon, effective March 19, 1980.
3-26-80		Motion of Brown Engineers, Inc. for 20 days additional time with certificate of service, filed.
3-26-80		ORDER: That the defendant, Brown Engineers, Inc. be granted addit twenty(20) days from the date hereof, filed and entered OB 1980-P filed. Copies mailed to attorneys.
4-21-80		ANSWER of W. R. Fairchild Construction Company, Ltd. to Complaint and Amended Complaint, with cert. of service and attachments, filed.
5-1-80		CONSENT ORDER FOR CONSOLIDATION - this cause is consolidated with S80-0359(R)(N) filed and entered in OB-1980, pages 1050-1051. Copies to attorneys.
5-5-80		Answer and Defense and Cross-Claim of Defendant Brown Engineers Inc. to the Amended Complaint with certificate of service and exhibits attached, filed.
-5-80		Answer and Claim of Brown Engineers, Inc. with exhibits and cert ficate of service, filed.
5-9-80		Copy of letter from atty Joe Sam Owen advising that Bobby O'Barr is now associate with him in representation of Jack N. Seymour, Jr., Plaintiff, filed.

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(Rev 1-75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF: Jack N. Seymour, Jr.

DEFENDANT: L & A Contracting Co., et al

DOCKET NO. 580-0

PAGE 1 OF ___ PA

DATE	NR	PROCEEDINGS
5-12-80		Pltf's Reply to Affirmative Defenses set forth in Answer of W. R. Fairchild C struction Company, Ltd., with cert. of service, filed.
5-12-80		Pltf's Reply to Affirmative Defenses set forth in Answer of Brown Engineers, with cert. of service, filed.
5-16-80		Notice of plaintiff to take depositions of Charlie Sindle, Ray and George Lee at 9:30 A.M. on June 5, 1980 at Hattiesburg, Mi with certificate of service, filed.
5-30-80		Motion of Roger T. Clark, Bryant & Stennis, to Withdraw as Counsel of Record f deft Moody Brothers of Jacksonville, Inc., with cert. of service, filed.
5-30-80		Answer of deft Ray Sims, Sr. to Interrogatories, with cert. of service and Ver cation of Ray Sims, Sr., filed.
5-30-80		Answers of Gulf Coast Pre-Stress Company to Interrogatories, with cert. of service and Verification of George J. Lee, filed.
5-30-80		Answers of L & A Contracting Company, Inc. to Interrogatories, with cert. of se vice, Verification of George J. Lee and Attachment, filed.
6-4-80		Answers of Deft Brown Engineers, Inc. to Interrogatories propounded by pltf, wi Verification of Joseph L. Brown, Jr. and cert. of service and Exhibits 1-4, fil
6-4-80		Response of deft Brown Engineers, Inc. to Request for Production of Documents, with cert. of service and Attachments 1-3, filed.
6-6-80		Response of L & A Contracting Company, Gulf Coast Pre-Stress Co and Moody Brothers of Jacksonville, Inc. to request for productio and inspection with exhibits attached and certificate of service,
6-9-80		Response of W.R. Fairchild Construction Co. to request for product and inspection with certificate of service, filed.
6-9-80		Notice of defendant, W.R. Fairchild Construction Co. that attached copy of Request for Admission filed with exhibits and certificate of service, filed.
6-9-80		Request for Admission under FRCP 36, filed.
6-13-80		Pltf's Response to Request for Admissions, with cert. of service, filed.
6-19-80		ORDER: Roger T. Clark allowed to withdraw as attorney of record for deft Moody Brothers of Jacksonville, Inc.; James K. Carrol and Eldon Bolton are substitute as counsel of record for Moody Brothers of Jacksonville, Inc., filed and entere in O.B. 1980, page 2080. Copies mailed to attys.
25-80		Answers to interrogatories propounded to W.R. Fairchild Construction Co., Ltd. filed.
6-26-80		Notice of deppsition of Jack N. Seymour to be taken at10:30 A.M. on July 1, 1960 with certificate of service, filed.

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S80-0274(N)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
ack N. Seymour, Jr.	L & A Construction Co.er al	DOCKET NO ______ PAGE 6 OF ____ PAG

DATE	NR.	PROCEEDINGS
-2-80		Deposition of Charles Sindle taken on June 5-1980, filed.
7-2-80		Deposition of George Lee taken on June 5-1980, filed.
7-2-80		Deposition of Ray A. Sims taken on June 5-1980, filed.
6-30-80		Response of L & A Contracting Co., Gulf Coast Pre-Stress Co. Moody Bros. of Jacksobville, to request for admissions with cert of service, filed.
7-8-80		Motion of plaintiff Jack Seymour to amend suit under the Jones Act General Maritime Law and to amend claim with certificate of servi filed.(Order to Judge)
7-8-80		ORDER: Consent order allowing second amended suit and amended clai and answer of Jack N. Seymour, filed and entered in OB 1980-pages 2331-2332. Copies mailed to attorneys.
7-14-80		Second Amended Suit under the Jones Act with certificate of ser filed.
7-14-80		Amended Claim and ANSWER of Jack N. Seymour, Jr. with certificat service, filed.
7-17-80		Notice that attached Motion for Summary Judgment will be set for ing on September 3, 1980 at 9:30 A.M. with certificate of service, filed.
7-17-80		MOTION of W.R. Fairchild Construction Co., filed.
8-13-80		Deposition of Jack N. Seymour, Jr. taken 7-1-80, filed.
9-3-80		Findings of Fact and Conclusions of Law, filed. Copies mailed to attys.
9-3-80		JUDGMENT OF DISMISSAL: (1) motion of W. R. Fairchild Construction Company, Ltd. for summary judgment is sustained as to claim of pltf Jack N. Seymour, Jr.; (2) judgment for and on behalf of W. R. Fairchild Construction Company, Ltd. is here entered in its behalf and against Jack N. Seymour, Jr.; (3) claim of Jack N. Seymour, Jr. against W. R. Fairchild Construction Company, Ltd. is hereby dismis with prejudice, the parties to bear their respective costs; (4) the crossclaim of W. R. Fairchild Construction Company, Ltd. against L & A Contracting Company be and is dismissed without prejudice, filed and entered in O.B. 1980, page s 2087-2088. Copies mailed to attys.
-10-80		Motion of W. R. Fairchild Construction Company, Ltd. for Summary Judgment, with Attached Notice that Motion will be heard before Judge Nixon in Biloxi on 10-14- at 9:30 a.m. with cert. of service, filed.
9-29-80		Motion of Brown Engineers, Inc. for Summary Judgment, with cert. of service and attached Notice that Motion will be heard before Judge Nixon in Biloxi at 9:30 a.m. on 10-14-80, filed.
10-20-80		Re-Notice that Motion for Summary Judgment has been re-set for 11-26-80 at 9:30 a.m. before Judge Nixon in Biloxi, with cert. of service filed

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF: Jack N. Seymour, Jr.
DEFENDANT: L & A Contracting Company, et al
DOCKET NO 880-0
PAGE 5 OF ___ PA

DATE	NR	PROCEEDINGS
10-30-80		Motion of defts L & A Contracting Company, Gulf Coast Pre-Stress Company and Moody Brothers of Jacksonville, Inc. for Compulsory Physical Examination, with cert. of service and attached Affidavit of James K. Carroll, and with attached Notice that motion will be heard before Judge Roper in Biloxi at 9:00 a.m. on 11-21-80, filed.
12-1-80		ORDER: Motion of Brown Engineers, Inc. for Summary Judgment is denied, filed entered in O.B. 1980, page 3570. Copies mailed to attys.
2-1-80		Deputy Clerk Sheet: Motions heard before Judge Walter Nixon on 11-26-80 at Biloxi, Mississippi; Motion of Brown Engineers, an W.R. Fairchild Construction for Summary Judgment, Denied; Moti to file cross claim to be filed by W.R. Fairchild Construction Cc filed.
-4-80		Notice of attached interrogatories with certificate of service, fi
-4-80		Interrogatories propounded to plaintiff with certificate of servic filed.
-4-80		ORDER: Overruling motion of W.R. Fairchild Construction Company for summary judgment on the cross-claim of Brown Engineers, Inc filed and entered in OB 1980-page 3594. Copies mailed to attorne
2-10-80		Plaintiff's answer to interrogatories with certificate of service filed. (Exhibits attached)
2-11-80		Interrogatories, second set, addressed to L & A Contracting Comp Gulf Coast Pre-Stress Company, Inc., Moody Bros. of Jacksonvil and Ray Sims, Sr. with certificate of service, filed.
/14/81		Set for trial Mar. 9, 1981.
-15-81		Answers of L & A Contracting Co. to interrogatories with certificate of servic filed.
26-81		Notice of attached MOTION for Leave to file cross-claim set for hearing on February 3, 1981 at 9:30 A.M. before Judge Nixon, with certificate of service, filed.
26-81		Motion for Leave to file cross-claim with exhibits attached, filed
-17-81		Deposition of Dr. Charles M. Holman, Jr. taken 6-2-81 in Biloxi, MS with attachments, filed.
-16-81		Deposition of Dr. Robert Ray Smith, taken September 11, 1981, Jackson, MS, filed
.11/82		Set for pretrial 4/16/82.
-12-82		ANSWER and defences of Brown Engineers, Inc. to Second Amended Suit under Jones Act and General Maritime Law for Maintenance and Cure, Wages, Unseaworthiness, Negligence and Under 33 U.S.C.A. 905(b), with certificateof service, filed.

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(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 880-0
Jack N. Seymour, Jr.	L & A Contracting Company, et al	PAGE 6 OF ____ P

DATE	NR	PROCEEDINGS
4-13-82		Motion of pltf., Jack N. Seymour, Jr. for Judgment by Default against Ray Sim Sr., with Certificate of Service, attachment and Affidavit of Joe Sam Owen, filed. (Order to Judge Nixon).
4-13-82		Motion of pltf. for Judgment by Default against L & A Contracting Company, Gul Coast Pre-Stress Company, Inc. and Moody Brothers of Jacksonville, Inc., with Certificate of Service, attachments and Affidavit of Joe Sam Owen, filed. (Order to Judge Nixon)
5-05-82		DEPUTY CLERK SHEET: Pretrial held before Judge Nixon April 16, 1982, Biloxi, ACTION TAKEN: Limitation and exoneration must be heard first. Answer in Jon Act case to be filed within 20 days. Counsel to explore settlement possibilit and report back to the Court. Entered on DCB.
5-17-82		Stipulation between the parties and Motion for Entry of Judgment, filed. (Hea to be held before Judge Roper May 18, 1982, 1:00 p.m., Biloxi, MS).
5-18-82		JUDGMENT: Judgment for plaintiff against L & A Contracting Company for sum of $665,000.00. Upon payment of judgment, L & A Contracting Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., Brown Engineers, Inc. and Fairchild shall be fully, finally and completely released and discharged from any and all liability of any kind or nature for damages arising out of accident of September 25, 1979 aboard Barge MOBRO 905. FURTHER upon payment of such judgment L & A Contracting Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., Brown Engineers, Inc. and Fairchild shall be fully and finally released and discharged from any obligation to Jack N. Seymour, Jr. for past or future maintenance and cure of any kind. Upon receipt of $665,000.00 Jack N. Seymou Jr. authorized and directed to execute any and all documents necessary to accomplish such full and final discharge of all parties, and each party to bea their respective costs. FURTHER Crossclaim of Brown Engineers, Inc. against W. R. Fairchild Construction Company, Ltd. dismissed with prejudice, parties t bear their respective costs. (WLN) Filed and entered OB 1982, pages 1852-185 Copies to attys.
5-18-82		Satisfaction of Judgment, filed.
5-18-82		Copy of Receipt and Release, filed.

JS-6 CARD

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
FEB 13 1980
HARVEY G. HENDERSON, CLERK
DEPUTY
BY

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR.,

Plaintiff

VERSUS

L & A CONTRACTING COMPANY, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD., GULF COAST PRE-STRESS COMPANY, INC., MOODY BROTHERS OF JACKSONVILLE, INC., and RAY SIMS, SR.,

Defendants.

CIVIL ACTION NO. S80 0274(1)

COMPLAINT

(Plaintiff Demands Trial By Jury)

SUIT UNDER THE JONES ACT AND GENERAL MARITIME LAW FOR MAINTENANCE AND CURE, WAGES, UNSEAWORTHINESS AND NEGLIGENCE

The Complaint of Jack N. Seymour, Jr., a person of full age of majority and a citizen of the State of Mississippi, through undersigned counsel, complaining of L & A Contracting Company, W. R. Fairchild Construction Company, Ltd., Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., and Ray Sims, Sr., Defendants herein, with respect represents:

I.

That this is a case under the Jones Act (46 U.S.C.A. Section 688) and General Maritime Law for Maintenance and Cure, Wages, Unseaworthiness and Common Law action for Negligence as herein more fully appears. This is a seamen's action pursuant to 28 U.S.C.A. 1916 without prepayment of fees or costs.

II.

That at all times mentioned herein, the Defendant, L & A Contracting Company, was and still is a Mississippi corporation organized and existing under and by virtue of the laws of the State of Mississippi doing business within the State of Mississippi including but not limited to the County of Harrison. That the Defendant, L & A Contracting Company, may be served with process by service upon its agent, Harley Sims at its registered office located on Sims Road in Forrest County, Hattiesburg, Mississippi.

III.

That at all times mentioned herein, the Defendant, W. R. Fairchild Construction Company, Ltd., was and still is a Mississippi corporation organized and existing under and by virtue of the laws of the State of Mississippi doing business within the State of Mississippi including the County of Harrison. That the Defendant, W. R. Fairchild Construction Company, Ltd., may be served with process by service upon its agent, Palmer Barron, at its offices located on Highway 49 North, Forrest County, Hattiesburg, Mississippi.

IV.

That at all times mentioned herein the Defendant, Gulf Coast Pre-Stress Company, Inc., was and still is a Mississippi corporation organized and existing under and by virtue of the laws of the State of Mississippi doing business within the State of Mississippi including the County of Harrison. That the Defendant, Gulf Coast Pre-Stress Company, Inc., may be served with process by service upon its agent, Ray Sims, at its registered office located on Sims Road and North 28th Avenue, Forrest County, Hattiesburg, Mississippi.

V.

That at all times mentioned herein the Defendant, Moody Brothers of Jacksonville, Inc., was a foreign corporation doing business within the State of Mississippi including the County of Harrison, engaged in the operation of owning, leasing and/or renting construction and industrial equipment of all kinds, including marine industrial equipment which encompasses the vessel described hereinafter. That the Defendant, Moody Brothers of Jacksonville, Inc., may be served with process pursuant to Section 13-3-57 of the Mississippi Code of 1972, Annotated, by service upon the Secretary of State of the State of Mississippi. Furthermore, notice of such service, together with a copy of the summons, shall be mailed forthwith as certified or registered mail, restricted for delivery to the addressee only and with postage prepaid by the Secretary of State to the Defendant, Moody Brothers of Jacksonville, Inc., at its last known address of Post Office Box 5350, 4652 Phillips Highway, Jacksonville, Florida 32207.

VI.

That at all times mentioned herein, the Defendant, Ray Sims, Sr., was and still is an adult resident citizen of the State of Mississippi, County of Forrest, City of Hattiesburg and may be served with process at his business office located on Sims Road and North 28th Avenue, Forrest County, Hattiesburg, Mississippi.

VII.

The Plaintiff was the employee of the Defendant, L & A Contracting Company, engaged in the project of removing the old Poppe Ferry Bridge situated across the back bay of Biloxi, Mississippi. That on said date and prior thereto, the Plaintiff was working on a navigable barge owned by the Defendant, Moody Brothers of Jacksonville, Inc., leased to the Defendant, Gulf Coast Pre-Stress Company, Inc., and used by the Defendants, L & A Contracting Company and W. R. Fairchild

Construction Company in the demolition and removal of the old Poppe Ferry Bridge described above. That on said date and prior thereto, the Plaintiff worked on the barge described above aiding and assisting in the stacking of concrete slabs removed from the bridge span. That in addition to working on the barge pursuant to a joint venture project by the Defendants, L & A Contracting Company and W. R. Fairchild Construction Company, the Plaintiff also, on a daily basis, operated a tug boat, owned by the Defendant Ray Sims, Sr., that propelled the barge from bank to bank and from origin to destination. That the tug boat referred to herein was operated by the Plaintiff on numerous occasions and was used to propel the barge to its destination, that being the physical plant facilities owned by the Defendant, Gulf Coast Pre-Stress Company, Inc. where the concrete slabs and other steel structures were unloaded and stored for ultimate disposition by the Defendant, Gulf Coast Pre-Stress Company, Inc.

VIII.

That on September [illegible], 1979 and prior thereto the Defendant, L & A Contracting Company, and the Defendant W. R. Fairchild Construction Company, Ltd., were jointly engaged, pursuant to a contract, in the demolition and removal of the old Poppe Ferry Bridge referred to above. That the joint venture arose by virtue of a contract being awarded by the Harrison County Board of Supervisors to the Defendants, L & A Contracting Company and W. R. Fairchild Construction Company, Ltd. That on said date and prior thereto, the Defendant, Gulf Coast Pre-Stress Company, Inc. was a sub-contractor furnishing a barge for use in the stacking and transporting of concrete slabs removed from the bridge span. That the Defendant, Moody Brothers of Jacksonville, Inc., was the owner of the barge having leased said barge to the Defendant, Gulf Coast Pre-Stress Company, Inc. with the knowledge of its intended use as a marine vessel to be used specifically as a stockpiling and transportation barge pursuant to the activities described herein. That the Defendant, Ray Sims, Sr., was the owner of a tug boat used to propel the above referred to barge from bank to bank and origin to destination including propelling the barge to the physical plant of the Defendant, Gulf Coast Pre-Stress Company, Inc. where the concrete slabs and steel beams were unloaded.

IX.

That on September [illegible], 1979 and prior thereto the Plaintiff was working on the barge referred to above contributing to the function of the vessel and the accomplishment of its mission by aiding and assisting in the loading and stacking of concrete slabs and steel beams on the barge that had been removed from the old Poppe Ferry Bridge. That the concrete slabs were being double stacked on rotten cross ties, twelve by twelve in dimmsion, with the aid of a crane located on a second barge, owned by the Defendant, Moody Brothers of Jacksonville, Inc. and leased to the Defendant, Gulf Coast Pre-Stress Company, Inc. which second barge was located adjacent to the barge the Plaintiff was working on. That while the Plaintiff was performing his duties on said barge, the two barges bumped or collided causing the rotten cross ties to shift, ultimately breaking, pinning the Plaintiff between a concrete slab and a steel girder. That as a direct result, the Plaintiff was pinned for a substantial period of time, enduring great pain and anguish during the period of entrapment. That the Plaintiff, in order to rescue himself, and without the aid of the senior foreman, directed the removal of the concrete slabs so as to aid and assist in extricating himself. That as a result of the serious and overwhelming personal injuries, the Plaintiff is now permanently and totally disabled at age twenty-seven.

X.

Plaintiff would show that as a result of the serious and permanent injuries sustained, he was admitted to the emergency room at Howard Memorial Hospital in Biloxi, Mississippi on September 25, 1979 where he remained in critical condition for a period of time through October 24, 1979. That on the date of his admission to Howard Memorial Hospital, the Plaintiff underwent emergency surgical repairs for an extensively damaged bladder and severely crushed pelvis. That subsequent to his surgery the following diagnoses were made:

1. Multiple-severe fractures of the pelvis.
2. Traumatic rupture of the urinary bladder.
3. Traumatic transection of the prostatomembraneous urethra.
4. Severe nerve damage to the peripheral nerves supplying the right pelvic area and the right lower extremity.
5. Post-traumatic reactive depression.

The Plaintiff would show that he remained hospitalized in Howard Memorial Hospital until October 24, 1979 when he was transported to University Hospital Jackson, Mississippi where he could receive specialized attention for the age to his bladder, severely crushed pelvis and the extensive nerve damage mpassing an area below his waist traversing down through his right leg. he Plaintiff would show that he remained hospitalized at University Hospital ntil December 5, 1979 when he was transported to the Mississippi Methodist spital and Rehabilitation Center in Jackson, Mississippi where he is presently continued. Plaintiff would show that as a direct result of the negligence of the Defendants as described herein and the unseaworthiness of the vessel as described herein, he will be permanently and totally disabled. Your Plaintiff would show that from a urological standpoint, he will require additional surgical procedures to satisfactorily connect the urinary bladder and prostate to remaining portions of the urethra. The Plaintiff would show that such procedures will be necessary to re-establish normal urinary continuity. Additionally, as a result of the severe injuries in the area of the prostate gland and the prostato-membraneous urethra, your Plaintiff will be permanently impotent. Your Plaintiff would further show that because of the severe injuries in the same area, he may never achieve normal continence of urine and because of the necessity of having an indwelling suprapubic urinary catheter to provide for satisfactory drainage of the urine, he will have long term problems with both urinary tract infection, stone formation and decrease in his total renal function. Your Plaintiff would show that from an orthopaedic standpoint, he sustained multiple fractures around the pelvis, including an injury to the S1 joint on the right side in association with a fracture about the iliac wing. The Plaintiff would also show that there was an associated fracture of his pubic and ischium rami on the right side. The Plaintiff would show that he was initially treated with an externally fixation device and this maintained him in reasonable alignment and has been worn by your Plaintiff up until the present time. Your Plaintiff would further show that from a neurological standpoint, he has all components out on his right leg, which means that he has no active ankle motion, nor does he have any active hip or knee motion. Your Plaintiff would show that this is a direct result of an avulsion of the sacral roots just after they left the spinal cord. Your Plaintiff would show that he will suffer and continue to suffer extreme physical pain and suffering as a result of the urological, orthopaedic and neurological damage all of which will require extensive therapeutical treatment and future surgical procedures. Your Plaintiff would further show that he has and will in the future incur inordinate expenses for hospitalization, physicians, surgical treatment, rehabilitation, pharmaceutical treatment, drugs, and orthopaedic prosthesis.

XI.

That as a direct result of the accident described above, the Plaintiff has and will continue to suffer extreme mental and physical anguish. That as a result of the extensive nerve damage as described above, the Plaintiff will be unable to engage in normal sexual activity for the remainder of his life. That in addition, the Plaintiff will continue to suffer extreme pain and mental anguish as a result of the crushed pelvis and will not be able to walk without the aid of a crutch or a brace on his leg.

XII.

That at all times mentioned herein, there was and is still in full force and effect an Act of Congress known as the Merchant Marine Act of 1920, commonly called the Jones Act (46 U.S.C.A. 688) which Act is applicable hereto. By reason of his employment aboard said vessel, in the capacity described above, the Plaintiff is entitled to maintain this action against his employer, L & A Contracting Company.

XIII.

That the Plaintiff suffered illness and serious injury to his person when in the course and scope of his employment, aiding in the navigation of said vessel or working on the navigable waters of the United States. That the Defendant, W. R. Fairchild Construction Company, Ltd., at all times mentioned herein was a joint venturer owing a non-delegable duty, as more specifically set forth hereinafter, to the Plaintiff for which breach of duty the Plaintiff is entitled to institute this action.

XIV.

That at all times mentioned herein, the Defendant, Moody Brothers of Jacksonville, Inc., was the owner of the vessel wherein the Plaintiff was working at the time of the subject accident and was also the owner of the vessel located adjacent to the vessel where the Plaintiff was working. That as a result, the Defendant, Moody Brothers of Jacksonville, Inc., owed the Plaintiff a duty to furnish a safe and seaworthy vessel upon which the Plaintiff could work. That the Defendant, Moody Brothers of Jacksonville, Inc., also had a non-delegable duty to furnish and equip the second vessel with such devices so as to prevent bumping or colliding with the Plaintiff's vessel in order to prevent the serious injuries as described herein.

XV.

FOR A FIRST CAUSE OF ACTION

(JONES ACT)

As a first cause of action, the Plaintiff repeats and realleges each and every allegation hereinbefore stated with the same force and effect as if the same [illegible] again herein set forth in full.

XVI.

That at all times mentioned herein, the Plaintiff was the employee of the Defendant, L & A Contracting Company, working on the barge referred to above aiding and assisting in the loading and stacking of the concrete slabs referred to above and operating the tug boat used to propel the barge described above. That the negligence of the Defendant, L & A Contracting Company, coupled with the unseaworthiness of the barge where the Plaintiff was working and the negligence of the other Defendants as described herein, was a direct and proximate result of the Plaintiff's serious and permanent injuries which acts of negligence are as follows:

1. In negligently failing to supply the Plaintiff with a safe place to work;

2. In negligently failing to supply the Plaintiff with a sufficient number of competent co-employees and supervisory officers;

3. In negligently failing to properly instruct the Plaintiff in the course of his duties;

4. In negligently failing to properly superintend and supervise the work going on at the time the Plaintiff was injured;

5. In negligently failing to properly instruct its officers in the loading and stacking of concrete slabs and sections which in itself is a high risk and extremely dangerous operation;

6. In negligently using rotted cross ties to stack heavy concrete slabs when the Defendants knew the inherent dangers associated with such activity.

XVII.

FOR A SECOND CAUSE OF ACTION

(UNSEAWORTHINESS)

For a second cause of action, the Plaintiff repeats and realleges each and every allegation hereinbefore stated with the same force and effect as if the same were again herein set forth in full.

XVIII.

That at all times mentioned herein, the Defendants, Gulf Coast Pre-Stress Company, Inc. and Moody Brothers of Jacksonville, Inc., had a non-delegable duty and obligation to furnish and provide to the Plaintiff a safe and seaworthy vessel, proper and sufficient safety devices, safe and adequate appliances, gear or equipment for the purpose for which it was used. That the serious and permanent injuries sustained by the Plaintiff were the direct and proximate result of the unsafe and unseaworthy condition of the vessel described above and the lack of proper and sufficient safety devices, appliances, gear or equipment.

XIX.

FOR A THIRD CAUSE OF ACTION

(NEGLIGENCE OF THE DEFENDANT, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD.)

For a third cause of action, the Plaintiff repeats and realleges each and every allegation hereinbefore stated with the same force and effect as if the same were again herein set forth in full.

XX.

That at all times mentioned herein, the Defendant, W. R. Fairchild Construction Company, Ltd., as a joint venturer with the Defendant, L & A Contracting Company, had a duty to supply and furnish the Plaintiff with a safe place in which to work and to supervise and inspect the working conditions of the Defendant, L & A Contracting Company. That the Defendant's, W. R. Fairchild Construction Company, Ltd. ommission of the non-delegable duties specified above constitute negligence for which this action is brought. That in addition, the Defendant, W. R. Fairchild Construction Company, Ltd., as a joint venturer, is also guilty of negligence by virtue of the negligence of the Defendant, L & A Contracting Company, being imputed to the Defendant, W. R. Fairchild Construction Company, Ltd.

XXI.

FOR A FOURTH CAUSE OF ACTION

(NEGLIGENCE OF THE DEFENDANT, GULF COAST PRE-STRESS COMPANY, INC.)

For a fourth cause of action, the Plaintiff repeats and realleges each and every allegation hereinabove stated with the same force and effect as if the same were again herein set forth in full.

XXII.

The Plaintiff alleges that the Defendant, Gulf Coast Pre-Stress Company, Inc., was negligent in one or more of the following respects which proximately caused or contributed to the serious acts and permanent injuries of the Plaintiff, to-wit:

a. Furnishing rotted cross ties to be used in the stacking of the concrete piles as described above;

b. In negligently failing to control the movement and the momentum of the barge located adjacent to the barge upon which the Plaintiff was working;

c. In failing to equip that barge with safety devices or other protective [illegible] so as to prevent the bumping of that barge with any other [illegible] located on navigable waters.

XXIII.

FOR A FIFTH CAUSE OF ACTION

(NEGLIGENCE OF THE DEFENDANT, MOODY BROTHERS OF JACKSONVILLE, INC.)

For a fifth cause of action, the Plaintiff repeats and realleges each and every allegation hereinbefore stated with the same force and effect as if the same were again herein set forth in full.

XXIV.

The Plaintiff alleges that the Defendant, Moody Brothers of Jacksonville, Inc., was negligent in one or more of the following respects which proximately caused or contributed to the serious and permanent injuries of the Plaintiff, to-wit:

1. In negligently failing to control the movement and the momentum of the barge located adjacent to the barge upon which the Plaintiff was working;

2. In failing to equip that barge with safety devices or other protective instrumentalities so as to prevent the bumping of that barge with any other vessels located on navigable waters.

XXV.

FOR A SIXTH CAUSE OF ACTION

(NEGLIGENCE OF THE DEFENDANT, RAY SIMS, SR.)

For a sixth cause of action, the Plaintiff repeats and realleges each and every allegation hereinbefore stated with the same force and effect as if the same were again herein set forth in full.

XXVI.

The Plaintiff alleges that the Defendant, Ray Sims, Sr., as the owner and the individual in control of the operation of the tug boat referred to above, was negligent in one or more of the following respects which proximately caused or contributed to the serious and permanent injuries of the Plaintiff, to-wit:

1. In negligently failing to supervise the operation of the tug boat in the movement and location of the barge upon which the Plaintiff was injured so as to prevent locating that barge in close proximity to the other barge that collided with the Plaintiff's barge and brought about the serious injuries described above;

2. In negligently allowing the Plaintiff to operate the tug boat over a period of time placing the Plaintiff in a position in which he had no training, skill or experience and thereby subjecting the Plaintiff to the hazards which brought about the injuries referred to herein.

3. In negligently failing to promulgate and enforce proper and safe rules for the safe conduct of the operation of the tug boat and the movement and location of the barge and to warn the Plaintiff of the impending dangers associated with the work on the barge whereupon the injury occurred.

4. In failing to supply the tug boat with a sufficient number of competent co-employees and officers so as to assist the Plaintiff in the operation

of the tug boat and the work performed on the barge in the stacking of the concrete slabs referred to above.

XXVII.

FOR A SEVENTH CAUSE OF ACTION

(MAINTENANCE AND CURE AND UNPAID WAGES)

For a seventh cause of action, the Plaintiff repeats and realleges each and every allegation hereinbefore stated with the same force and effect as if the same were again herein set forth in full.

XXVIII.

Upon the Plaintiff becoming ill and injured as aforesaid, it became the duty of the Defendant, L & A Contracting Company to furnish the Plaintiff with prompt medical care, attention and medicines and the expenses of maintenance and cure.

XXIX

That said Defendant has negligently and wilfully failed to pay to Plaintiff the expense of his maintenance while incapacitated and that the expense of his medical care, attention, medicines and maintenance is One Hundred Ninety-Five Thousand ($195,000.00) Dollars, no part of which has been paid, although demanded.

XXX.

That upon the Plaintiff becoming injured, the Defendant owed the Plaintiff unpaid wages for which he demands the sum of One Thousand ($1,000.00) Dollars.

XXXI.

The Plaintiff, as a direct result of the acts, omissions and commissions of the Defendants described herein, or any one act thereof, itemizes his damages as follows:

(a)	Physical and personal injuries with resulting pain and discomfort, distress, permanent disability, past, present and future,	$ 3,000,000.00
(b)	Emotional and mental anguish as a result of the urological, orthopaedic and neurological injuries,	2,000,000.00
(c)	Loss of wages and income, past and impairment of earning capacity, present and future,	750,000.00
(d)	Future medical, hospital, pharmaceutical, therapeutical, nursing care and drug expenses,	250,000.00
		$ 6,000,000.00

WHEREFORE, the Plaintiff prays for judgment herein in his favor and against the Defendants in the following respects:

1. The sum of One Hundred Ninety-Five Thousand ($195,000.00) Dollars, medical care, attention, medicines and maintenance from the Defendant, L & A Contracting Company.

2. The sum of One Thousand ($1,000.00) Dollars unpaid wages from the Defendant, L & A Contracting Company.

3. The sum of Six Million ($6,000,000.00) Dollars, compensatory damages, from the Defendants, L & A Contracting Company, W. R. Fairchild Construction Company, Ltd., Gulf Coast Pre-Stress Company, Moody Brothers of Jacksonville, Inc., and Ray Sims, Sr., jointly and severally.

4. The Plaintiff prays for the above together with legal interest and costs.

Respectfully submitted,

JACK M. SEYMOUR, JR., Plaintiff

JOE SAM OWEN, Attorney for Plaintiff
1919 23rd Ave.; P. O. Box 673
Gulfport, Mississippi 39501
(601) 868-2821

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
FEB 13 1980
HARVEY G. HENDERSON, CLERK
BY DEPUTY

JACK N. SEYMOUR, JR., Plaintiff

VERSUS

L & A CONTRACTING COMPANY, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD., GULF COAST PRE-STRESS COMPANY, INC., MOODY BROTHERS OF JACKSONVILLE, INC., and RAY SIMS, SR., Defendants.

CIVIL ACTION NO. ______

INTERROGATORIES ADDRESSED TO THE DEFENDANT, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD.

Comes now the Plaintiff in the above entitled action, pursuant to Rule 33 of the Federal Rules of Civil Procedure, and files the following Interrogatories to be answered separately, under oath, by any officer of the Defendant, W. R. Fairchild Construction Company, Ltd., competent to testify in its behalf, which Interrogatories shall be answered within the time prescribed by Rule 33. Please take further notice that these Interrogatories shall be deemed continuing and any change or supplementation to the Answers to Interrogatories shall be filed within the time prescribed by the applicable rules:

1. Please state your corporate name, state of incorporation, names and addresses of all stockholders, officers and directors.

2. Please state if W. R. Fairchild Construction Company, Ltd. was a joint venturer with L & A Contracting Company in the demolition and removal of the old Poppe Ferry Bridge.

3. Please state whether W. R. Fairchild Construction Company, Ltd. was a party to a contract awarded by the Harrison County Board of Supervisors for the demolition and removal of the old Poppe Ferry Bridge. If so, then please state the full name and addresses of all parties to said contract.

4. When payment was made by Harrison County for the work done on the demolition of the old Poppe Ferry Bridge, please state if checks were issued to L & A Contracting Company and W. R. Fairchild Construction Company, Ltd. (In answering this Interrogatory please state the number of checks issued and payee or payees of each check).

5. Please state the names and addresses of all employees of W. R. Fairchild Construction Company, Ltd. who worked, either in a supervisory capacity or as a manual laborer, on the demolition of the old Poppe Ferry Bridge.

In answering this Interrogatory, please state the job designation for each such employee. In further answering this Interrogatory, please state which employees were actually working at the time of the subject accident which occurred on September 25, 1979.

6. Please state if W. R. Fairchild Construction Company, Ltd. owned or leased any equipment for use on the job during the demolition of the old Poppe Ferry Bridge.

7. If the answer to the preceding Interrogatory is in the affirmative, please state the following:

(a) A complete physical description of said equipment.

(b) The names and addresses of the owners of said equipment.

(c) The present physical location of said equipment.

8. Please describe in full detail, the exact job responsibilities of W. R. Fairchild Construction Company, Ltd. with reference to the demolition of the old Poppe Ferry Bridge.

9. Please state if any agent, officer or employee of W. R. Fairchild Construction Company, Ltd. inspected, at any time, the demolition job site for safety or work progress or for any other job related reason.

10. If the answer to the preceding Interrogatory is in the affirmative, then please state the following:

(a) The names and addresses of the person or persons who made said inspections.

(b) The purpose of the inspections.

(c) The dates of the inspections.

(d) Whether written reports were prepared and if so, the present physical location of said reports.

11. Please state the names and addresses of all contractors and [illegible] contractors that in any manner performed labor or work or furnished supplies or materials for the demolition of the old Poppe Ferry Bridge.

12. With reference to the preceding Interrogatory, please state [illegible] following:

(a) The type of work performed by said contractor or sub-contractor.

(b) The supplies or materials furnished.

(c) The date the supplies or materials were furnished.

13. Please state the name and address of the owner of the barge whereupon Jack Seymour was working at the time of the subject accident. (Hereinafter, this will be referred to as the Seymour barge.)

14. With reference to the preceding Interrogatory, please identify the Seymour barge by name, number or other identifying nomenclature.

15. Please state the name and address of the owner of the second barge located adjacent to the Seymour barge at the time of the subject accident. (Hereinafter, this will be referred to as the second barge.)

16. Please identify the second barge by name, number or other identifying nomenclature.

17. Please state the name and address of the owner of the crane situated upon the second barge at the time of the subject accident.

18. Please state the name and address of the operator of said crane and the name and address of his employer. (This Interrogatory is applicable to the time of the subject accident.)

19. Please describe in full detail all safety rules promulgated by W. R. Fairchild Construction Company, Ltd. for employees of L & A Contracting Company or for other independent contractors working on the demolition of the old Popps Ferry Bridge.

20. Please describe in full detail all work performed, either supervisory or otherwise, by W. R. Fairchild Construction Company, Ltd. for the demolition of the old Popps Ferry Bridge.

21. Please state the name and address of the owner of the tug boat operated by Jack Seymour on the date of the accident and prior thereto, which tug boat was used to propel the Seymour barge.

22. Please identify said tug boat by name, number, Coast Guard registration number or other identifying nomenclature.

23. Please state in full detail your version of how the subject accident occurred.

24. Please state in full detail each and every step you took to prevent the subject accident.

25. Please state in detail the following:

(a) The dates and length of time of each day that Jack Seymour worked on the Seymour barge.

(b) His job responsibilities while working on the Seymour barge.

(c) The dates that Jack Seymour operated the tug boat referred to in the preceding Interrogatories.

26. Please describe in full detail the manner in which the concrete slabs or section removed from the old Poppe Ferry Bridge were being stacked or piled on the Seymour barge. (Please include in your answer a complete description of any lumber or other supporting device used in the stacking or piling process.)

27. Please state the name and address of the company or individual who furnished the lumber or cross ties referred to in the preceding Interrogatory.

28. Please state the name and address of each and every individual who assisted in the preparation of these answers to Interrogatories.

29. Please state the name and address of the agent or officer who participated on behalf of W. R. Fairchild Construction Company, Ltd. in the negotiations that resulted in a contract being awarded by the Board of Supervisors of Harrison County, Mississippi to W. R. Fairchild Construction Company, Ltd. and L & A Contracting Company, for the demolition and removal of the old Poppe Ferry Bridge.

Respectfully submitted,

JACK N. SEYMOUR, Plaintiff

By: ______________________________
JOE SAM OWEN, Attorney for Plaintiff
1919 23rd Ave.; P. O. Box 673
Gulfport, Mississippi 39501
(601) 868-2821

FILED
FEB 13 1980
[illegible], CLERK

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR.,
Plaintiff

VERSUS

CIVIL ACTION NO. [illegible]

L & A CONTRACTING COMPANY, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD., GULF COAST PRE-STRESS COMPANY, INC., MOODY BROTHERS OF JACKSONVILLE, INC., and RAY SIMS, SR.,
Defendants.

REQUEST FOR PRODUCTION AND INSPECTION

Pursuant to the Federal Rules of Civil Procedure, the Plaintiff, Jack N. Seymour, Jr., propounds the following written Request for Production and Inspection of documents and for inspection of certain equipment and vessels specified below to the Defendant, W. R. Fairchild Construction Company, Ltd. requiring that each request be responded to separately and fully in writing within the prescribed time and that said documents thereafter be made available for inspection and copying and said equipment and vessels be made available for inspection. This Request for Production shall be a continuing request and any change in response given occasioned by new information or any other reason shall be immediately supplemented.

The Plaintiff requests that the Defendant, W. R. Fairchild Construction Company, Ltd. produce for inspection and copying the following documents and papers:

1. The original or a copy of the contract awarded by the Harrison County Board of Supervisors for the demolition of the old Popps Ferry Bridge.

2. The original or a copy of the joint venture agreement between L & A Contracting Company and W. R. Fairchild Construction Company, Ltd.

3. The original or a copy of any other agreements between L & A Contracting Company and W. R. Fairchild Construction Company, Ltd. relative to the demolition of the old Popps Ferry Bridge.

4. The original or a copy of any agreements between W. R. Fairchild Construction Company, Ltd. and any sub-contractors for sub-contract work performed on the demolition of the old Popps Ferry Bridge.

5. The original or a copy of any leases whereby W. R. Fairchild Construction Company, Ltd. leased any equipment for use during the demolition of the old Popps Ferry Bridge. (The word leases encompasses any written agreements or other written memoranda for the use or hire of any equipment.)

6. The original or a copy of any leases whereby W. R. Fairchild Construction Company, Ltd. leased any boats, barges or other navigable vessels for use during the demolition of the old Poppe Ferry Bridge. (The word leases encompasses any written agreement or other written memoranda for the use or hire of any such boats, barges or navigable vessels.)

7. The original or copies of any and all liability insurance policies insuring W. R. Fairchild Construction Company, Ltd., which were in effect at the time of the subject accident, including all general liability policies, all marine policies and all Workmen's Compensation policies.

8. The original or copies of any and all safety pamphlets, brochures or other written compilations distributed by W. R. Fairchild Construction Company, Ltd. to its employees three months prior to and through the date of the subject accident.

9. Any photographs, pictures or slides taken by W. R. Fairchild Construction Company, Ltd. or any of its agents, employees, officers or investigators during or subsequent to the subject accident.

10. Copies of any accident reports relating to the subject accident prepared by any employees, agents, representatives, officers, investigators or insurance adjusters that are in the possession of W. R. Fairchild Construction Company, Ltd. (W. R. Fairchild Construction Company, Ltd. includes its officers, directors, supervisors, foremen, attorneys, and investigators).

11. Copies of any accident reports prepared by any other company, subcontractor, independent investigative agency that are in the possession of W. R. Fairchild Construction Company, Ltd.

12. Any photographs or pictures of the two barges (referred to in the Interrogatories as the Seymour barge and the second barge) either prior to or subsequent to the subject accident.

13. Any inter-office safety memos distributed among the officers, supervisors, directors or employees of W. R. Fairchild Construction Company, Ltd. (This includes a period of time three months prior to and through the date of the subject accident.)

14. Copies of any and all correspondence between W. R. Fairchild Construction pany, Ltd. and any sub-contractors or between any sub-contractors and W. R. rchild Construction Company, Ltd. relating in any manner to work performed supplies furnished during the demolition of the old Poppe Ferry Bridge. (This quest encompasses a period of time prior to and after the subject accident.)

15. Copies of any and all correspondence between W. R. Fairchild Construction ny, Ltd. and L & A Contract ompany relating in any manner to the

demolition of the old Popps Ferry Bridge. (This includes a period of time prior to and after the subject accident.)

16. Copies of any and all correspondence between W. R. Fairchild Construction Company, Ltd. and the owners of any barges, boats or other vessels used during the demolition of the old Popps Ferry Bridge. (This includes a period of time prior to and subsequent to the accident.)

17. The Plaintiff further requests that the Defendant, W. R. Fairchild Construction Company, Ltd., make available for inspection and photographing, the following things:

(a) The barge referred to in the Interrogatories as the Seymour barge which was the site of the subject accident.

(b) The barge referred to in the Interrogatories as the second barge which was adjacent to the Seymour barge at the time of the subject accident.

(c) The tug boat referred to in the Complaint and Interrogatories which was operated by the Plaintiff on the date of and prior to the subject accident.

(d) The lumber or cross ties referred to in the Complaint and Interrogatories which were used in the stacking of the concrete slabs or sections prior to the subject accident. (This request includes the damaged and undamaged lumber or cross ties.)

(e) The concrete slabs or sections that were being stacked on the Seymour barge at the time of the subject accident.

It is requested that the above documents and things be made available for inspection and copying or inspection and photographing within the time prescribed by the Federal Rules of Civil Procedure.

Respectfully submitted,

JACK H. SEYMOUR, JR., Plaintiff

By:______________________________
JOE SAM OWEN, Attorney for Plaintiff
1919 23rd Ave.; P. O. Box 673
Gulfport, Mississippi 39501
(601) 868-2821

[illegible]
FILED
FEB 25 1980
[illegible] CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR.,
Plaintiff

VERSUS

L & A CONTRACTING COMPANY, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD., GULF COAST PRE-STRESS COMPANY, INC., MOODY BROTHERS OF JACKSONVILLE, INC., RAY SIMS, SR., and BROWN ENGINEERS, INC.,
Defendants

CIVIL ACTION NO. S80-0274

AMENDED COMPLAINT

(Plaintiff Demands Trial By Jury)

AMENDED SUIT UNDER THE JONES ACT AND GENERAL MARITIME LAW FOR MAINTENANCE AND CURE, WAGES, UNSEAWORTHINESS AND NEGLIGENCE

The Amended Complaint of Jack N. Seymour, Jr., a person of full age of majority and a citizen of the State of Mississippi, through undersigned counsel, complaining of L & A Contracting Company, W. R. Fairchild Construction Company, Ltd., Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr. and Brown Engineers, Inc., Defendants herein, with respect represents:

I.

That by reference, each and every allegation set forth in Paragraphs I. through XXVI. of the Original Complaint, including the separate six causes of action, are readopted and made a part of this Amended Complaint to the extent as if each allegation was manually copied herein.

XXVII.

FOR A SEVENTH CAUSE OF ACTION

(NEGLIGENCE OF THE DEFENDANT, BROWN ENGINEERS, INC.)

For a seventh cause of action, the Plaintiff repeats and realleges each and every allegation set forth in the Original Complaint and in the preceding Paragraph of this Amended Complaint with the same force and effect as if the same were again herein set forth in full.

XXVIII.

That at all times mentioned herein, the Defendant, Brown Engineers, Inc., was a Mississippi Corporation, organized and existing under and by virtue of the laws of the State of Mississippi, doing business within the State of Mississippi including but not limited to the County of Harrison. That the Defendant, Brown Engineers, Inc., may be served with process by service upon its agent, Joseph L. Brown, Jr., at its registered office located at 1410 24th Avenue, Gulfport, Mississippi.

XXIX.

That at all times mentioned herein, the Defendant, Brown Engineers, Inc., was the principal engineer employed to prepare specifications for the demolition of the old Popps Ferry Bridge and to supervise and inspect the demolition of said bridge. That as such, it was the duty of the Defendant, Brown Engineers, Inc., to safely and competently design and set in full force and effect a working set of plans or specifications for the safe and timely demolition of the old Popps Ferry Bridge. That it was also the duty of the Defendant, Brown Engineers, Inc., to supervise and inspect the demolition work performed on the Popps Ferry Bridge by the Defendants herein, including the various employees such as the Plaintiff. That the duty to inspect also included the duty to supervise and inspect the loading, stacking and transportation of the concrete sections or girders removed from the old Popps Ferry Bridge as alleged in the other counts of this Amended Complaint.

XXX.

That on the date of the subject accident, and prior thereto, the Defendant, Brown Engineers, Inc., had totally failed to perform the duties specified in the preceding paragraph and as a result of its negligence, the Plaintiff sustained serious injuries rendering him permanently and totally disabled. That the Defendant, Brown Engineers, Inc., was guilty of the following acts of negligence, or any one act specified below, which entitles the Plaintiff to reasonable compensation:

1. In negligently failing to prepare safe and proper specifications for the demolition of the old Popps Ferry Bridge;

2. In failing to ascertain that the Defendants, L & A Contracting Company and W. R. Fairchild Construction Company, Ltd., were in fact reputable, reliable and competent general contractors for the purpose of performing the demolition of the old Popps Ferry Bridge;

3. In negligently failing to conduct timely and adequate inspections of the demolition work;

4. In negligently failing to ascertain that the Defendants, L & A Contracting Company and W. R. Fairchild Construction Company, Ltd., were performing the demolition work in a proper and safe manner;

5. In negligently failing to supervise and inspect the loading, stacking and transporting of the concrete sections or girders upon the barge as described in the preceding paragraphs;

6. In negligently allowing rotted cross ties to be used to stack heavy concrete slabs when the Defendant, Brown Engineers, Inc., knew the dangers associated with

such activity and which activity could have been prevented had the Defendant performed timely inspections;

7. In negligently allowing L & A Contracting Company and W. R. Fairchild Construction Company, Ltd. to conduct the demolition of the old Poppe Ferry Bridge in an unsafe, hastily and ill equipped manner exposing the Plaintiff to certain risks when the Defendant knew that W. R. Fairchild Construction Company, Ltd. and L & A Contracting Company were delinquent on the stipulated completion date.

XXXI.

FOR AN EIGHTH CAUSE OF ACTION

(MAINTENANCE AND CURE AND UNPAID WAGES)

For an eighth cause of action, the Plaintiff repeats and realleges each and every allegation hereinbefore stated with the same force and effect as if the same were again herein set forth in full.

XXXII.

Upon the Plaintiff becoming ill and injured as aforesaid, it became the duty of the Defendant, L & A Contracting Company to furnish the Plaintiff with prompt medical care, attention and medicines and the expenses of maintenance and cure.

XXXIII.

That said Defendant has negligently and wilfully failed to pay to Plaintiff the expense of his maintenance while incapacitated and that the expense of his medical care, attention, medicines and maintenance is One Hundred Ninety-Five Thousand ($195,000.00) Dollars, no part of which has been paid, although demanded.

XXXIV.

That upon the Plaintiff becoming injured, the Defendant owed the Plaintiff unpaid wages for which he demands the sum of One Thousand ($1,000.00) Dollars.

XXXV.

The Plaintiff, as a direct result of the acts, omissions and commissions of the Defendants described herein, or any one act thereof, itemizes his damages as follows:

(a) Physical and personal injuries with resulting pain and discomfort, distress, permanent disability, past, present and future,	$ 3,000,000.00
(b) Emotional and mental anguish as a result of the urological, orthopaedic and neurological injuries,	[illegible],000,000.00

(c)	Loss of wages and income, past and impairment of earning capacity, present and future,	$ 750,000.00
(d)	Future medical, hospital, pharmaceutical, therapeutical, nursing care and drug expenses,	250,000.00
		$ 6,000,000.00

WHEREFORE, the Plaintiff prays for judgment herein in his favor and against the Defendants in the following respects:

1. The sum of One Hundred Ninety-Five Thousand ($195,000.00) Dollars, medical care, attention, medicines and maintenance from the Defendant, L & A Contracting Company.

2. The sum of One Thousand ($1,000.00) Dollars unpaid wages from the Defendant, L & A Contracting Company.

3. The sum of Six Million ($6,000,000.00) Dollars, compensatory damages, from the Defendants, L & A Contracting Company, W. R. Fairchild Construction Company, Ltd., Gulf Coast Pre-Stress Company, Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., and Brown Engineers, Inc., jointly and severally.

4. The Plaintiff prays for the above together with legal interest and costs.

Respectfully submitted,

JACK M. SEYMOUR, JR., Plaintiff

JOE SAM OWEN, Attorney for Plaintiff
1919 23rd Ave.; P. O. Box 673
Gulfport, Mississippi 39501
(601) 868-2821

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

IN THE MATTER OF: * CIVIL ACTION

L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY AND MOODY BROTHERS OF JACKSONVILLE, INC. AS OWNERS/OPERATORS OF THE M/V SWITCHER II, BARGE MOBRO 905 AND BARGE CMS 110, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY

NO. S80-0354(c)

* * * * * * *

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAR 20 1980
HARVEY G. HENDERSON, CLERK
BY

COMPLAINT

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI:

The complaint of L & A Contracting Company, as owner of the M/V SWITCHER II, as owner pro hac vice/operator of the Barge CMS-110, L & A Contracting Company and Gulf Coast Pre-Stress Company, as owners pro hac vice/operators of the Barge MOBRO 905, and Moody Brothers of Jacksonville, Inc., as owner of the MOBRO 905, in a cause of exoneration from or limitation of liability, civil and maritime, within the meaning of Rule 9 (h) of the Federal Rules of Civil Procedure and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims, respectfully alleges upon information and belief as follows:

I.

This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears.

II.

At all times hereinafter mentioned, plaintiff L & A Contracting Company was and now is the sole owner of the M/V SWITCHER II, having an office and place of business at P. O. Box 1828, Hattiesburg, Mississippi.

III.

At all times hereinafter mentioned, plaintiff L & A Contracting Company, was the owner pro hac vice/operator of the Barge CMS 110, and manned, victualed and navigated said vessel within the meaning of 46 U.S.C.A. §186, having an office and place of business at P. O. Box 1828, Hattiesburg, Mississippi.

IV.

At all times hereinafter mentioned, plaintiffs L & A Contracting Company and Gulf Coast Pre-Stress Company, were and now are owners pro hac vice/operator of the Barge MOBRO 905, and manned, victualed and navigated said vessel within the meaning of 46 U.S.C.A. §186, and L & A Contracting Company has an office and place of business at P. O. Box 1828, Hattiesburg, Mississippi, and Gulf Coast Pre-Stress Company has an office and place of business in Harrison County, Mississippi.

V.

At all times hereinafter mentioned, plaintiff Moody Brothers of Jacksonville, Inc. was the sole owner of the Barge MOBRO 905, having an office and place of business in Jacksonville, Florida, and was engaged in the business of leasing its Barge MOBRO 905 to L & A Contracting Company for use in connection with certain work performed by L & A Contracting Company or others.

VI.

The M/V SWITCHER II is a steel-hull vessel, 31 feet in length, 11 feet in breadth and 3.5 feet in depth, the Barge CMS 110 is a document vessel of the United States, Official Number 554552, with a registered length of 110.0 feet, registered breadth of 45.0 feet, and registered depth of 6.5 feet and having Belle Chasse, Louisiana as its home port, the Barge MOBRO-905 is a deck barge, with a registered length of 130.0 feet, registered breadth of 40.0 feet, and a registered depth of 8.0 feet. At all times pertinent hereto, the said steel hull vessel SWITCHER II, said Barge CMS 110 and said Barge MOBRO 905 were tight, staunch, strong, fully and properly manned, equipped and supplied and in all respects seaworthy and fit for the service in which they were engaged.

VII.

On September 25, 1979, the M/V SWITCHER II, the Barge CMS-110 and the Barge MOBRO 905 were employed by L & A Contracting Company in connection with the demolition of the old Popps Ferry Bridge situated across the back bay of Biloxi, Mississippi. The M/V SWITCHER II was and is a small work boat owned and operated by L & A Contracting Company, while the Barge CMS-110 was and is a spud barge which had been bareboat chartered to L & A Contracting Company for use in connection with its operations at the Popps Ferry Bridge, and the Barge MOBRO 905 was and is a deck barge which was being operated by L & A Contracting Company under an Equipment Lease Agreement with Moody Brothers of Jacksonville, Florida. The Barge CMS-110 was employed by L & A Contracting Company to support a crane used to dismantle the old Popps Ferry Bridge, while the Barge MOBRO 905 was being used to haul debris from the work area. The M/V SWITCHER II was used exclusively to propel the CMS-110 from the bank to the channel area where the Barge CMS-110 would be spudded down for use in connection with the demolition of the bridge. At approximately 1130 hours on September 25, 1979, while L & A Contracting Company was loading and stacking concrete slabs and steel beams on the Barge MOBRO 905 an accident occurred and, as a result a concrete slab shifted, pinning one person aboard MOBRO 905 between the concrete slab and a steel girder, resulting in personal injuries to that person.

VIII.

The aforementioned casualty occurred on the waters of the back bay of Biloxi, on September 25, 1979.

IX.

The aforesaid casualty and resultant personal injury and damage were caused not by the fault of the SWITCHER II, Barge CMS-110, or Barge MOBRO 905, their crew, or of any person for whose acts or omissions plaintiffs are responsible, but on the contrary, were caused solely and only by the fault of person who was injured or were caused by the fault of others for whom plaintiffs are not responsible.

Plaintiffs reserve the right to amend this paragraph of their complaint as further facts become known to them.

Plaintiffs deny that either they or the SWITCHER II, or Barge CMS-110 or Barge MOBRO 905, or any person or property for whom or for which they may be responsible, are liable to any extent in the premises, and plaintiffs desire to claim exoneration from liability for all losses, damages, injuries and destruction done, occasioned and incurred by reason of the matter aforesaid; plaintiffs allege that they have valid defenses to all such claims and are not liable therefor. In the alternative, and without admitting liability, which they continue to deny, plaintiffs show that in the event that they or the M/V SWITCHER II, or Barge CMS-110 or Barge MOBRO 905 should be held responsible to party or parties by reason of the matters hereinabove set forth, plaintiffs claim the benefit of the limitation of liability provided by the Revised Statutes of the United States and any and all laws supplemental thereto or amendatory thereof. All losses, damages, injuries and destruction resulting from the aforesaid casualty were done, occasioned or incurred without the privity or knowledge of plaintiffs.

X.

Plaintiffs are informed, fear and believe that, as a result of the aforesaid casualty, the following person may have suffered injuries to person or property:

NAME	INJURY
Jack H. Seymour, Jr.	Personal injuries

At the present time, plaintiffs do not know and have no way of knowing the full extent and amount of such losses, damages and injuries, but fear and believe that the aggregate value of the claims which can reasonably be expected to be made against plaintiffs and/or the M/V SWITCHER II, Barge CMS-110 and Barge MOBRO

905 is greatly in excess of the value of plaintiffs' interest in the M/V SWITCHER II, Barge CMS-110 and Barge MOBRO 905 and their freight at the termination of the voyage during which the said accident occurred. At least one suit has been filed to date in this District against plaintiffs and/or the M/V SWITCHER II, Barge CMS-110 and Barge MOBRO 905, and suit has been commenced against several other parties arising out of the aforesaid casualty. Attached hereto and made a part hereof as Exhibit "A" is a list of all claimants and potential claimants about whom or which plaintiffs have knowledge as of the time of the filing of this complaint. Attached hereto and made a part hereof as Exhibit "B" is a list of all actions and proceedings which presently are pending, arising out of this casualty.

XI.

At the termination of the voyage aforesaid, the value of the M/V SWITCHER II, Barge CMS-110 and Barge MOBRO 905 which was and is the value of petitioners' interest in the said vessels, did not exceed the sum of THREE HUNDRED TWENTY THOUSAND AND NO/100 ($320,000.00) DOLLARS. Plaintiffs show that there was no freight pending on the voyage.

XII.

Plaintiffs file contemporaneously herewith a bond or stipulation in the appropriate form, with an approved corporate surety, for the payment into Court of the amount of plaintiffs' interest in the M/V SWITCHER II, Barge CMS-110, Barge MOBRO 905, and their pending freight, together with interest at the rate of six per cent (6%) per annum from the date of said stipulation, and for costs; and, in addition thereto, plaintiffs are prepared to give bond or stipulation for any amount in excess of the ad interim stipulation as may be ascertained and determined to be necessary under the orders of this Court, and as provided by the laws of the United States and the Federal Rules of Civil Procedure.

XIII.

There are no demands, unsatisfied liens or claims of lien against the M/V SWITCHER II, Barge CMS-110 or Barge MOBRO 905 arising out of the aforesaid voyage, or any suits pending thereon, so far as is known to plaintiff, other than those set forth herein and attached in Exhibits "A" and "B".

XIV.

All and singular, the premises herein are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, plaintiffs pray:

1. That this Court make an order approving the above described stipulation for value with surety, deposited with the Court by the plaintiffs; as security for the amount or value of plaintiffs' interest in the aforesaid M/V SWITCHER II, Barge CMS-1. and Barge MOBRO 905, and their pending freight.

2. That this Court issue a notice to all persons asserting claims with respect to which the complaint seeks exoneration or limitation, admonishing them to file their respective claims with the Clerk of this Court, and to serve on the attorneys for plaintiffs a copy thereof on or before the date to be named in the notice and that if any claimant desires to contest either the right to exoneration from or the right to limitation of liability, he shall file and serve on the attorneys for the plaintiffs an answer to the complaint on or before the said date, unless his claim has included an answer, so designated.

3. That this Court enjoin the further prosecution of any and all actions, suits, or proceedings already commenced and the commencement or prosecution thereafter of any or all actions, suits, or proceedings, of any nature or description whatsoever in any jurisdiction against plaintiffs as aforesaid, or against the M/V SWITCHER II, Barge CMS-110 or Barge MOBRO 905 or against any property of the plaintiffs, except in this action, to recover

damages for or in respect of any loss, damage, death, injury or destruction caused by or resulting from the aforesaid casualty.

4. That this Court adjudge that plaintiffs are not liable to any extent for any loss, damage, death, injury or destruction or for any claim therefor in any way arising out of or resulting from the aforesaid casualty, or done, occasioned or incurred on the said voyage.

5. In the alternative, that if plaintiffs shall be adjudged liable, then that such liability be limited to the amount or value of plaintiffs' interest in the M/V SWITCHER II, Barge CMS-110 and Barge MOBRO 905 and their pending freight as aforesaid at the end of the voyage on which they were engaged at the time of the casualty, and that plaintiffs and/or the M/V SWITCHER II, Barge CMS-110 and Barge MOBRO 905 be discharged therefrom upon the surrender of such interest, and that the money surrendered, paid or secured to be paid as aforesaid, be divided pro rata according to the hereinabove mentioned statutes among such claimants as may duly prove and claim in accordance with the provisions of the order hereinabove prayed for, saving to all parties any priorities to which they may be legally entitled, and that a decree may be entered discharging plaintiffs and/or the M/V SWITCHER II, Barge CMS-110 and Barge MOBRO 905 from any further liability.

6. The plaintiffs may have such other further or different relief as may be just.

RESPECTFULLY SUBMITTED:

James K. Carroll

JAMES K. CARROLL, TRIAL ATTORNEY

Gerard T. Gelpi

GERARD T. GELPI, TRIAL ATTORNEY

and

GELPI, SULLIVAN, CARROLL & LABORDE
934 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 524-9714
Attorneys for L & A Contracting Company
and Gulf Coast Pre-Stress Company

and

ELDON BOLTON, JR., TRIAL ATTORNEY
Security Savings Building
Gulfport, Mississippi 39501

STATE OF MISSISSIPPI

COUNTY OF [illegible]

BEFORE ME, the undersigned authority, a notary public duly commissioned and qualified within and for the State and County aforesaid, personally came and appeared George Lee, who, being by me first duly sworn, did depose and say:

That he is George Lee, Secretary-Treasurer of L & A Contracting Company, and that he is Secretary-Treasurer of Gulf Coast Pre-Stress Company, and that he has read the foregoing complaint and that all and singular the allegations thereof are true and correct to the best of his knowledge, information and belief; and that it is his desire to file the attached complaint for exoneration from or limitation of liability.

George Lee
GEORGE LEE

SWORN TO AND SUBSCRIBED
BEFORE ME THIS sixth DAY
OF MARCH, 1980.

Linda F. Miller
NOTARY PUBLIC

My Commission Expires [illegible]

AFFIDAVIT

STATE OF XXXXXXXXX MISSISSIPPI

XXXXXXXXXXXXXXXXX COUNTY OF HARRISON

BEFORE ME, the undersigned authority, personally came and appeared, James K. Carroll, who, after being duly sworn did depose and say:

That he is a member of the firm of Gelpi, Sullivan, Carroll & Laborde, and is trial attorney for plaintiff; that he has read the above and foregoing complaint and that all and singular the allegations thereof are true and correct to the best of his knowledge, information and belief, the source of his information and the grounds for his belief being material contained in his file furnished to him by his client.

James K. Carroll
JAMES K. CARROLL

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 20th DAY
OF MARCH, 1980.

Sherry S. Ethridge
NOTARY PUBLIC

MY COMMISSION EXPIRES MAY 6, 1982

EXHIBIT "A"

CLAIMANTS AND POSSIBLE CLAIMANTS

NAME	ADDRESS
Jack H. Seymour, Jr.	c/o Joe Sam Owen Attorney-at-Law 1919 23rd Avenue P. O. Box 673 Gulfport, Mississippi 395
Central Marine Service, Inc.	835 Union Street Suite 300 New Orleans, Louisiana 701
Brown Engineers	1410 24th Avenue Gulfport, Mississippi
W. R. Fairchild	Highway 49 North Forrest County Hattiesburg, Mississippi

EXHIBIT "B"

PENDING LITIGATION

The following action is presently pending in the United States District Court for the Southern District of Mississippi, Southern Division:

Jack N. Seymour, Jr. vs. L & A Contracting Company, W. R. Fairchild Construction Company, Ltd., Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc. Ray Sims, Sr. and Brown Engineers, Inc.; Civil Action No. S80-0274 (R).

10,117

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

IN THE MATTER OF:	*	CIVIL ACTION
L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY and MOODY BROTHERS OF JACKSONVILLE, INC., AS OWNERS/OPERATORS OF THE M/V SWITCHER II, BARGE MORRO 905 AND BARGE CMS 110, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY	*	NO. S80-0359(R)

* * * * * * * * *

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAR 20 1980
[illegible] CLERK
BY

AFFIDAVIT OF VALUE

STATE OF MISSISSIPPI

COUNTY OF HARRISON

BEFORE ME, the undersigned authority, personally came and appeared George Brookfield, who, being duly sworn, deposed:

That he is a marine surveyor; that he has surveyed and inspected and is familiar with the M/V SWITCHER II; that he is familiar with the casualty referred to in the petition; that he is, in general, familiar with vessel market conditions in the Gulf of Mexico area and vicinity; and that, in his opinion, the fair market value of the M/V SWITCHER II did not exceed the sum of TWENTY-FIVE THOUSAND AND NO/100 ($25,000.00) DOLLARS, immediately subsequent to the casualty described in the petition.

George Brookfield
GEORGE BROOKFIELD

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 20th DAY
OF MARCH, 1980.

Sharon S. Etheridge
NOTARY PUBLIC

MY COMMISSION EXPIRES [illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

IN THE MATTER OF: * CIVIL ACTION

L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY AND MOODY BROTHERS OF JACKSONVILLE, INC., AS OWNERS/OPERATORS OF THE M/V SWITCHER II, BARGE MOBRO 905 AND BARGE CMS 110, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY * NO. S80-0359(r)

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAR 20 1980
HARVEY G. HENDERSON, CLERK
BY DEPUTY

* * * * * * * * * * *

AFFIDAVIT OF VALUE

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared TIM DOWNEY, who being duly sworn, deposed and said:

That he is a marine surveyor; that he has surveyed and inspected and is familiar with the Barge MOBRO 905; that he is familiar with the casualty referred to in the petition; that he is, in general, familiar with vessel market conditions in the Gulf of Mexico area and vicinity; and that, in his opinion, the fair market value of the Barge MOBRO 905 did not exceed the sum of ONE HUNDRED NINETY THOUSAND AND NO/100 ($190,000.00) DOLLARS, immediately subsequent to the casualty described in the petition.

Tim Downey
TIM DOWNEY

SWORN TO AND SUBSCRIBED
BEFORE ME THIS [illegible] DAY
OF MARCH, 1980.

NOTARY PUBLIC

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

IN THE MATTER OF:	CIVIL ACTION
L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY AND MOODY BROTHERS OF JACKSONVILLE, INC., AS OWNERS/OPERATORS OF THE M/V SWITCHER II, BARGE MOBRO 905 AND BARGE CMS 110, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY	NO. S80-0359

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAR 20 1980
[illegible], CLERK
BY

* * * * * * * * * * * *

AFFIDAVIT OF VALUE

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared WESLEY WILLIAMS, who being duly sworn, deposed and said:

That he is Vice President of Central Marine Service, Inc., that he has surveyed and inspected and is familiar with the Barge CMS-110; that he is, in general, familiar with vessel market conditions in the Gulf of Mexico area and vicinity; and that, in his opinion, the fair market value of the Barge CMS-110 did not exceed the sum of ONE HUNDRED FIVE THOUSAND AND NO/100 ($105,000.00) DOLLARS, immediately subsequent to the casualty described in the petition.

Wesley L. Williams
WESLEY WILLIAMS

SWORN TO AND SUBSCRIBED
BEFORE ME THIS/ DAY
OF MARCH, 1980.

NOTARY PUBLIC

[illegible], NOTARY PUBLIC
PARISH OF ORLEANS, LA
MY COMMISSION EXPIRES AT MY DEATH

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

IN THE MATTER OF: *

L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY and MOODY BROTHERS OF JACKSONVILLE, INC., AS OWNERS/OPERATORS OF THE M/V SWITCHER II, BARGE MOBRO 905 AND BARGE CMS 110, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY

* * * * * * * * *

CIVIL ACTION

NO. S80-0359(c)

FILED

MAR 21 1980

ORDER APPROVING PLAINTIFF'S STIPULATION FOR VALUE, DIRECTING THE ISSUANCE OF NOTICE TO CLAIMANTS AND RESTRAINING PROSECUTION OF CLAIMS

A complaint having been filed herein on the 20th day of March, 1980, by L & A Contracting Company, Gulf Coast Pre-Stress Company and Moody Brothers of Jacksonville, Inc., plaintiffs, as owners and/or operators of the M/V SWITCHER II, Barge CMS-110 and Barge MOBRO 905, for exoneration from or limitation of liability, pursuant to Sections 4281-4285 and 4289 and the Revised Statutes of the United States (46 U.S.C. 181-185, 188) and Rule "F" of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, for any loss, damage, or injury caused by or resulting from the demolition of the Old Popps Ferry Bridge across the back bay of Biloxi, Mississippi and resultant accident on September 25, 1979, as more fully described by the facts and circumstances set forth in the complaint; and plaintiffs having filed a bond for costs and an *ad interim* stipulation for the value of the said vessels and her pending freight, all as required by the rules of this Court and the law;

NOW, THEREFORE, upon motion of Gelpi, Sullivan, Carroll & Laborde and Eldon Bolton, attorneys for plaintiffs:

I.

IT IS ORDERED that the stipulation for costs in the sum of $250.00 executed on the 20 day of March, 1980, by plaintiffs, as principals and The Travelers Indemnity Company, as surety, be accepted and approved as to quantum, form and surety; and

II.

IT IS FURTHER ORDERED that the ad interim stipulation for value of plaintiffs' interest in the M/V SWITCHER II, Barge CMS-110 and Barge MOBRO 905 and their pending freight, in the principal amount of THREE HUNDRED TWENTY THOUSAND AND NO/100 ($320,000.00) DOLLARS with interest thereon at the rate of six (6%) per cent per annum from date thereof, executed on the 21st day of March, 1980, by plaintiffs, as principals, and by Insurance Company fo North America as surety, and filed herein by plaintiffs be accepted as an ad interim stipulation, for the purpose of a limitation proceeding and that it be approved as to form, quantum and surety; and

IT IS FURTHER ORDERED that plaintiffs and any claimant who may properly become a party hereto may contest the amount or value of plaintiffs' interest in the M/V SWITCHER II, Barge CMS-110 and Barge MOBRO 905 and their pending freight, as fixed in said ad interim stipulation, and may move the Court for due appraisal of said interest and may apply to have the amount of said stipulation increased or diminished, as the case may be, on the determination by the Court of the amount or value of said interest; and

III.

IT IS FURTHER ORDERED that a notice shall be issued out of and under the seal of this Court to all persons asserting claims with respect to which the complaint seeks exoneration or limitation, admonishing them to file their respective claims with the Clerk of Court, in writing, and to serve on the attorneys for the plaintiffs a copy thereof on or before the 5th day of May, 1980, or be defaulted, and that if any claimant desires to contest either the right to exoneration from or the right to limitation of liability, he shall file and serve on attorneys for the plaintiffs an answer to the complaint on or before the said date, unless his claim has included an answer to the complaint, so designated, or be defaulted.

IV.

IT IS FURTHER ORDERED that the aforesaid notice shall be published in the form required by Supplemental Rule "F" of the Federal Rules of Civil Procedure once a week for four successive weeks prior to the date fixed for the filing of claims in a newspaper of general circulation published in the city of Biloxi, Mississippi, namely the Biloxi Daily Herald; and copies of the notice shall also be mailed in accordance with the same Supplemental Rule "F".

V.

IT IS FURTHER ORDERED that the commencement and/or further prosecution of any action or proceeding against the plaintiffs, their underwriters or any of their property with respect to any claims for which plaintiffs seek exoneration from or limitation of liability, including any claim arising out of or connected with any loss, damage, death, injury or destruction resulting from the casualty described in the complaint, be and the same is hereby stayed and restrained until the hearing and determination of this proceeding.

VI.

IT IS FURTHER ORDERED that plaintiffs may make service of this order as a restraining order through the United States Post Office by mailing a conformed copy thereof to the person or persons to be restrained, or to their respective attorneys, or alternatively, by hand delivery.

Jackson ~~Biloxi~~, Mississippi, this 21st day of March 1980.

UNITED STATES DISTRICT JUDGE

James K Carroll

JAMES K. CARROLL, TRIAL ATTORNEY

Gerard T. Gelpi

GERARD T. GELPI, TRIAL ATTORNEY

and

GELPI, SULLIVAN, CARROLL & LABORDE
934 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 524-9714
Attorneys for plaintiffs

and

ELDON BOLTON, JR., TRIAL ATTORNEY
Security Savings Building
Gulfport, Mississippi 39501

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
APR 2[illegible] 1980
HARVEY G. HENDERSON, CLERK
By Agnes Dynn DEPUTY

IN THE MATTER OF:

L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY AND MOODY BROTHERS OF JACKSONVILLE, INC. AS OWNERS/OPERATORS OF THE M/V SWITCHER II, BARGE MOBRO 905 AND BARGE CMS 110, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY

CIVIL ACTION NO. S80-0359(N)

MOTION BY CLAIMANT FOR CONSOLIDATION OF ACTIONS

Comes now Jack N. Seymour, Jr., Claimant in the above styled cause, through his attorney, Joe Sam Owen, and moves the Court for an Order consolidating the above entitled action with the case of Jack N. Seymour, Jr., Plaintiff versus L & A Contracting Company, W. R. Fairchild Construction Company, Ltd., Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., and Brown Engineers, Inc., Civil Action No. S80-0274(N) which case is now pending in this Court, and in support would show the following:

I.

That this Motion is filed pursuant to Rule 42(a) of the Federal Rules of Civil Procedure.

II.

Your Movant would show that on the 13th day of February, 1980 and the 25th day of February, 1980, a suit and amended suit under the Jones Act and General Maritime Law for Maintenance and Cure, Wages, Unseaworthiness and Negligence was filed by your Movant, as Plaintiff, against L & A Contracting Company, W. R. Fairchild Construction Company, Ltd., Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr. and Brown Engineers, Inc., Civil Action No. S80-0274(N).

III.

Your Movant would further show that on the 20th day of March, 1980 the above Limitation proceeding was filed by L & A Contracting Company, Gulf Coast Pre-Stress Company, Inc. and Mandy Brothers of Jacksonville, Inc. Your Movant would show that the Complaint for Exoneration From or Limitation of Liability arose out of the same accident that involves the subject matter of the action filed by your Movant as the Plaintiff. Your Movant would further show that the subject Limitation proceeding will involve common questions of law or fact. Your Movant would further show that the facts and issues in the two actions, except the issue of damages and the issue of exoneration or limitation, are identical and the Plaintiffs herein, who are also Defendants in the suit referred to above, are represented by the same counsel. Your Movant would further show that no party to any of the actions would be prejudiced by the consolidation of said actions but that a consolidation will expedite the trial and promote the convenience of the Court and the ends of justice.

Respectfully submitted,

JACK M. SEYMOUR, JR., Claimant

By: ______________________________
JOE SAM OWEN, Attorney for Claimant
1919 23rd Ave.; P. O. Box 673
Gulfport, Mississippi 39501
(601) 868-2821

CERTIFICATE OF SERVICE

I, JOE SAM OWEN, Attorney for Jack M. Seymour, Jr., do hereby certify that I have this day forwarded by United States mail, postage prepaid, a true and correct copy of the above and foregoing Motion by Claimant for Consolidation of Actions to the Honorable Gerard T. Gelpi and Honorable James K. Carroll, Gelpi, Sullivan, Carroll & Laborde, at their usual mailing address of 934 One Shell Square, New Orleans, Louisiana 70139, and the Honorable Eldon L. Bolton, Jr., at his usual mailing address of Security Savings Building, Gulfport, Mississippi 39501, Attorneys for L & A Contracting Company, Gulf Coast Pre-Stress Company and Ray Sims, Sr. and Mandy Brothers of Jacksonville, Inc.; and to the Honorable George E. Morse, White & Morse, Attorney for W. R. Fairchild Construction Company, Ltd., at his usual mailing address of Post Office Drawer 100, Gulfport, Mississippi 39501; and to the Honorable Fred Mannino, Page, Mannino & Peresich, Attorney for

Brown Engineers, Inc., at his usual mailing address of Post Office Drawer 289, Biloxi, Mississippi; and to the Honorable Roger T. Clark, Bryant and Stennis, at his usual mailing address of Post Office Box 10, Gulfport, Mississippi 39501.

This the _____day of April, 1980.

JOE SAM OWEN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION
March 25, 1980

TO: Attorneys of Record

RE: Civil Action No. S80-0274(R)

Jack H. Seymour, Jr.
vs.
[illegible] A Contracting Co., et al

Per instructions of the Court, the above Civil Action has been reassigned to Judge Nixon, effective March 19, 1980.

When filing pleadings in the future, the civil action number should bear the initial (N).

HARVEY G. HENDERSON, CLERK

By: ______________________
Deputy Clerk

cc: Ms. Gwen Bryant
Ms. Glenda Bond
Ms. Rhoda Capuano
Ms. Iris Henley

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

JACK [illegible] SEYMOUR, JR.,
Plaintiff

versus

L & A CONTRACTING COMPANY, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD., GULF COAST PRE-STRESS COMPANY, INC., MOODY BROTHERS OF JACKSONVILLE, INC., RAY SIMS, SR. and BROWN ENGINEERS, INC.,
Defendants

CIVIL ACTION
NO. S80-0274 (R)

* * * * * * * * * * *

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants, L & A Contracting Company, Gulf Coast Pre-stress Company and Ray Sims, Sr., be and they are hereby granted an additional 20 days, up to and including April 7, 1980, within which to complete their investigation and to file pleadings herein, with a full reservation of all rights of said defendants, including the right to object to the jurisdiction of this Honorable Court.

Biloxi, Mississippi, this 13th day of March, 1980.

S/ John M. Roper

UNITED STATES [illegible]
Magistrate

Respectfully submitted:

S/ [illegible]

[illegible], Trial Attorney

S/ [illegible]

[illegible], Trial Attorney

and

[illegible], SULLIVAN, CARROLL & [illegible]
934 One Shell Square
New Orleans, LA 70139
Telephone [illegible]-9714
Attorneys for L & A Contracting Company, Gulf Coast Pre-Stress Company, [illegible]

[illegible] Counsel:
[illegible]
[illegible]

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAR 14 1980
HARVEY G. HENDERSON, CLERK
BY DEPUTY

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DIVISION OF THE SOUTHERN
DISTRICT OF MISSISSIPPI, AT BILOXI

CIVIL ACTION NO. S80-0274(R)

JACK N. SEYMOUR, JR. **PLAINTIFF**

VERSUS

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD.,
GULF COAST PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE, INC.,
and RAY SIMS, SR. **DEFENDANT**

ORDER ALLOWING MOODY BROTHERS OF JACKSONVILLE, INC. ADDITIONAL TIME TO PLEAD

This cause having come on this day to be heard on motion of the defendant Moody Brothers of Jacksonville, Inc. for additional time to plead to the Complaint, Interrogatories and Request for Production and Inspection filed against it in the above matter, and the Court, being fully advised in the premises, and noting that the plaintiff's attorney has indicated his approval of this additional time requested by the defendant by approving this Order, find that said motion is well taken and the defendant, Moody Brothers of Jacksonville, Inc., is hereby granted an additional thirty (30) days time from the date hereof in which to file responsive pleadings in this matter. It is therefore,

ORDERED and ADJUDGED that Moody Brothers of Jacksonville, Inc. be and it is hereby granted thirty (30) days additional time from the date hereof in which to file responsive pleadings.

ORDERED and ADJUDGED this the 14th day of March, 1980.

UNITED STATES MAGISTRATE

APPROVED:

Joe Sam Owen, Attorney for Plaintiff

A TRUE COPY, I HEREBY CERTIFY.
HARVEY G. HENDERSON, CLERK
BY:
DEPUTY CLERK

[illegible] DISTRICT OF [illegible]
FILED
MAR 26 1980
HARVEY C. [illegible], CLERK
DEPUTY
BY

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR. PLAINTIFF

VERSUS CIVIL ACTION NO. S80-0274(R) 71

L & A CONTRACTING COMPANY, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD., GULF COAST PRE-STRESS COMPANY, INC., HOODY BROTHERS OF JACKSONVILLE, INC., RAY SIMS, SR., and BROWN ENGINEERS, INC. DEFENDANTS

ORDER

This cause having come on for hearing on the Motion of the Defendant, Brown Engineers, Inc., for additional time in which to answer, plead, or demur to the Amended Complaint exhibited against it herein, and the Court being advised that counsel for the Plaintiff has no objection to the granting of the same, finds that the motion should be sustained. It is therefore,

ORDERED AND ADJUDGED that the Defendant, Brown Engineers, Inc., be granted an additional twenty (20) days from date hereof in which to answer, plead or demur to the Amended Complaint.

ORDERED AND ADJUDGED this the 26th day of March, 1980.

s/ John M. Roper

UNITED STATES MAGISTRATE

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 1 1980
[illegible], CLERK
BY [illegible] DEPUTY

IN THE MATTER OF:

L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY AND MOODY BROTHERS OF JACKSONVILLE, INC. AS OWNERS/OPERATORS OF THE M/V SWITCHER II, BARGE MOBRO 905 AND BARGE CMS 110, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY

CIVIL ACTION NO. S80-035

AND

JACK N. SEYMOUR, JR.

PLAINTIFF

VERSUS

CIVIL ACTION NO. S80-027

L & A CONTRACTING COMPANY, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD., GULF COAST PRE-STRESS COMPANY, INC., MOODY BROTHERS OF JACKSONVILLE, INC., RAY SIMS, SR., and BROWN ENGINEERS, INC.

DEFENDANTS

CONSENT ORDER FOR CONSOLIDATION

The above entitled action, Civil Action No. S80-0359(R), came on for hearing on the Motion of the Claimant, Jack N. Seymour, Jr., for consolidation of the above actions and it appearing to the Court that said actions involve a common question of law and fact and the facts and issues in the two actions, except the issue of damages and the issue of exoneration or limitation, are identical. It is therefore

ORDERED AND ADJUDGED that Civil Action No. S80-0359(R) be and it is hereby transferred to United States District Judge Walter L. Nixon, Jr. and consolidated with Civil Action No. S80-0274(N) and that this consolidated cause shall proceed under the title of Jack N. Seymour, Jr., Plaintiff, versus L & A Contracting Company, W. R. Fairchild Construction Company, Ltd., Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., and Brown

Engineers, Inc., Civil Action No. S80-0274(N), Consolidated.

Dated: April 29, 1980

s/Dan M. Russell, Jr.
UNITED STATES DISTRICT JUDGE

CONSENTED TO AND APPROVED BY:

JAMES K. CARROLL, Attorneys for Plaintiffs
GELPI, SULLIVAN, CARROLL & LABORDE
934 One Shell Square
New Orleans, Louisiana 70139

JOE SAM OWEN, Attorney for Claimant,
Jack H. Seymour, Jr.
1919 23rd Ave.; P. O. Box 673
Gulfport, Mississippi 39501

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK H. SEYMOUR, JR. — PLAINTIFF

VERSUS — CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC. — DEFENDANTS

CONSOLIDATED WITH:

IN THE MATTER OF:

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CMS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY — PETITIONERS

CIVIL ACTION NO. S80-0359(N)

BROWN ENGINEERS, INC. — CLAIMANT

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 5 1980
HARVEY T. HENDERSON, CLERK
DEPUTY

ANSWER AND DEFENSE AND CROSS-CLAIM OF DEFENDANT BROWN ENGINEERS, INC. TO THE AMENDED COMPLAINT OF THE COMPLAINANT

Comes now Brown Engineers, Inc. one of the Defendants in the above styled and numbered cause and in response to the Amended Complaint on file herein would show unto the Court the following, to-wit:

FIRST DEFENSE

That the Complaint fails to state a cause of action against the Defendant upon which relief can be granted.

SECOND DEFENSE

Answering the allegations of the Complaint paragraph by paragraph this Defendant would say:

1. As to Paragraph I of the Amended Complaint, this Defendant would say that the allegations of Paragraphs I through XXXI and the unnumbered paragraph beginning Wherefore of the original Complaint and each and every subparagraph thereof, which are incorporated by reference into the Amended Complaint through

Paragraph I of the Amended Complaint and which set forth the firs six causes of action claimed by the Plaintiff, do not pertain to this Defendant and no response is necessary. However, should this Defendant be mistaken, this Defendant categorically denies each and every allegation of each and every paragraph and subparagraph, and denies each and every cause of action alleged therein and would demand strict proof of the same.

2. As to Paragraph XXVII of the Amended Complaint, this Defendant would say that the allegations of Paragraph I through XXXI, and the unnumbered paragraph beginning Wherefore, and each and every subparagraph thereof, which are incorporated by reference into the Amended Complaint through Paragraph XXVII of the Amended Complaint and which set forth the first six causes of action claimed by the Plaintiff, do not pertain to this Defendant and no response is necessary. However, should this Defendant be mistaken, this Defendant categorically denies each and every allegation of each and every paragraph and subparagraph thereof and denies each and every cause of action alleged therein and would demand strict proof of the same.

3. The allegations of Paragraph XXVIII of the Amended Complaint are admitted.

4. The allegations of Paragraphs XXIX and XXX of the Amended Complaint and each and every subparagraph thereof are denied.

5. The allegations of Paragraphs XXXI, XXXII, XXXIII and XXXIV of the Amended Complaint being the allegations of the Eighth Cause of Action for Maintenance and Cure and Unpaid Wages do not pertain to this Defendant and no response to the same is necessary However should this Defendant be mistaken, this Defendant denies the allegations of each and every subparagraph thereof and would demand strict proof of the same.

6. The allegations of Paragraph XXXV and the unnumbered paragraph beginning Wherefore of the Amended Complaint and each and every subparagraph thereof are denied and it is further denied that this Defendant is indebted to the Plaintiff in any amount whatsoever.

THIRD DEFENSE

Alternatively, this Defendant would affirmatively show that the sole proximate or a proximate contributing cause of the injuries herein complained of by the Plaintiff was his own negligence in failing to exercise reasonable care for his own safety at all times while working around the barges in question during the demolition of the Poppe Ferry Bridge.

FOURTH DEFENSE

Alternatively, this Defendant would show that the sole proximate or a proximate contributing cause of the injuries herein complained of was not the negligence of this Defendant but the unreasonably dangerous risk knowingly and willingly assumed by the Plaintiff when he placed himself under the pile of concrete slabs stacked on the barge without needing to do so to complete his assigned task.

FIFTH DEFENSE

Alternatively, this Defendant would show that the only duty assumed by this Defendant and the only duty imposed upon them by law were the duties set forth under the contracts executed by and between this Defendant and Harrison County Development Commission and Harrison County, Mississippi. That pursuant to Section 9112 of that contract, this Defendant assumed no duty to supervise the activities of the other Defendants, nor did they assume any duty to see that the demolition of the Poppe Ferry Bridge was done in a safe manner. The only duty that this Defendant undertook was to see that the demolition was completed in accordance with the plans and specifications for said project set out in the contract documents.

CROSS-CLAIM

Comes now Brown Engineers, Inc. one of the Defendants in the above styled and numbered cause and files this its Cross-Claim against the Defendants W. R. Fairchild Construction Company, Ltd., L & A Contracting Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., and Ray Sims, Sr. and in support thereof would respectfully show unto the Court the following facts, to wit:

1. That your Cross-Claimant and Cross-Defendants W. R. Fairchild Construction Company, Ltd., L & A Contracting Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonvil Inc. and Ray Sims, Sr. are Defendants in this cause and that the Court has jurisdiction over said parties and the subject matter of this Corss-Claim pursuant to Rule 13(g) of the Federal Rules of Civil Procedure.

2. That in this cause of action Jack N. Seymour, Jr. seeks to impose liability upon Defendant Brown Engineers, Inc. and others including the Cross-Defendants herein for among other things negligence in the demolition and removal of the Old Popps Ferry Bridge in the City of Biloxi located on a navigable waterway in the Back Bay of Biloxi in the Southern District of Mississippi on or about September 25, 1979. That the Cross-Claimant Brown Engineers, Inc. gives notice that at the trial of this cause it intends to introduce evidence from which the trier of fact could ascertain that any and all damages suffered by the Plaintiff Jack N. Seymour, Jr., if any proved, resulted in whole or in part from the negligent acts of the Cross-Defendants and/or their agents and employees.

3. That to the extent that the joint or several negligence of Cross-Defendants contributed to the damages, if any, suffered by the Complainant Jack N. Seymour, Jr. the said Defendants W. R. Fairchild Construction, Ltd. and Ray Sims, Sr. should indemnify and/or hold Brown Engineers, Inc. harmless from any and all judgments entered against them and for funds expended in defense of these claims on behalf of the Plaintiff Jack N. Seymour, Jr. pursuant to the general maritime law and pursuant to Sections 6.30 through 3.32 of the contract executed by and between the Cross-Defendant W. R. Fairchild Construction Company, Ltd. as joint ventures with Cross-Defendant L & A Construction Company and the Harrison County Development Commission and Harrison County, Mississippi, copies of which are attached hereto and incorporated herein being marked Exhibit "A".

Now having fully answered the Complaint on file herein against it and asserting its defenses thereto, Defendant Brown

Engineers, Inc. respectfully requests that the Complaint of Jack N. Seymour, Jr. on file herein against it be dismissed with prejudice as to the rights of the Plaintiff. In the event that said Complaint is not dismissed but judgment is rendered in favor of the Plaintiff against this Defendant then this Defendant prays that it be rendered judgment on the Cross-Claim against the Cross-Defendants W. R. Fairchild Construction Company, Ltd., L & A Contracting Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc. and Ray-Sims, Sr. in an amount equal to the judgment rendered by the Court in favor of the Plaintiff Jack N. Seymour, Jr.

Respectfully submitted,
BROWN ENGINEERS, INC.
BY: PAGE, MANNINO & PERESICH

BY: ____________________
Of Counsel

CERTIFICATE

I, Paul J. Delcambre, Jr. of the firm of Page, Mannino & Peresich do hereby certify that I have mailed a true and correct copy of the foregoing Answer and Defense and Cross-Claim to Mr. Joe Sam Owen, Attorney for the Plaintiff, P.O. Box 673, Gulfport, Mississippi 39501.

This the 5th day of May, 1980.

PAUL J. DELCAMBRE, JR.

CERTIFICATE

I, Paul J. Delcambre, Jr. of the firm of Page, Mannino & Peresich do hereby certify that I have mailed a true and correct copy of the foregoing Answer and Defense and Cross-Claim to James K. Carroll, Gelpi, Sullivan, Carroll & Laborde, One Shell Square, Suite 934, New Orleans, Louisiana 70139 and Eldon L. Bolton, Jr., White & Morse, P. O. Drawer 100, Gulfport, Mississippi 39501.

This the 5th day of May, 1980.

PAUL J. DELCAMBRE, JR.

This document has important legal consequences; consultation with an attorney is encouraged with respect to its completion or modification.

STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR

ON THE BASIS OF A STIPULATED SUM

THIS AGREEMENT made as of the 17th day of November, in the year 1976 by and between

HARRISON COUNTY DEVELOPMENT COMMISSION
P. O. BOX 569, GULFPORT, MISSISSIPPI 39501
(hereinafter called OWNER) and

L & A CONTRACTING COMPANY and W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD.
A JOINT VENTURE, P. O. BOX 1828, HATTIESBURG, MISSISSIPPI 39401
(hereinafter called CONTRACTOR)

WITNESSETH THAT OWNER and CONTRACTOR in consideration of the mutual covenants hereinafter set forth, agree as follows:

Article 1. WORK. The CONTRACTORS shall perform all Work as specified or indicated in the Contract Documents for the completion of the Project generally described as follows:

CONSTRUCTION OF POPPS FERRY BRIDGE PROJECT ACROSS THE BACK BAY OF BILOXI,
BILOXI, MISSISSIPPI.

Article 2. ENGINEER. The Project has been designed by
BROWN ENGINEERS, INC. (formerly Brown & Berryhill, Inc.)
P. O. BOX 1118, GULFPORT, MISSISSIPPI 39501
and
MAXWELL T. HUFF, CONSULTING ENGINEER
455 WOODLAND HILLS BUILDING, 3000 OLD CANTON ROAD
JACKSON, MISSISSIPPI

who will act as ENGINEER in connection with completion of the Project in accordance with the Contract Documents.

Article 3. CONTRACT TIME. The Work will be completed within Eight Hundred (800) days after the date when the Contract Time commences to run as provided in paragraph 2.5 of the General Conditions.

NSPE 1910-8-A-1 (1974 Edition)
Reprinted 12-74 10M

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"This document has been approved by the American Consulting Engineers Council, and recommended for use by its members."

Article 4. CONTRACT PRICE. OWNER shall pay CONTRACTOR for performance of the Work in accordance with the Contract Documents in current funds as follows:

(here insert a lump sum, unit prices or both, attaching exhibits if necessary)
(use separate form for Cost-Plus Contracts)

Five Million Two Hundred Twenty-Seven Thousand Six Hundred Fifty-Two and 87/100 Dollars ($5,227,652.87) in accordance with the CONTRACTORS unit price proposal dated September 2, 1976.

Article 5. APPLICATIONS FOR PAYMENT. CONTRACTOR shall submit Applications for Payment in accordance with Article 14 of the General Conditions. Applications for Payment will be reviewed by ENGINEER as provided in the General Conditions.

Article 6. PROGRESS AND FINAL PAYMENTS. OWNER shall make progress payments on account of the Contract Price on the basis of CONTRACTOR's Applications for Payment as approved by ENGINEER, on or about the Tenth (10th) day of each month during construction as provided below. All progress payments will be on the basis of the progress of the Work measured by the schedule of values provided for in paragraph 14.1 of the General Conditions.

6.1. Prior to Substantial Completion progress payments will be in an amount equal to:

Ninety (90)% of the Work completed, and

Ninety (90)% of material and equipment not incorporated in the Work but delivered and suitably stored, less in each case the aggregate of payments previously made.

6.2. Upon Substantial Completion, OWNER shall pay an amount sufficient to increase total payments to CONTRACTOR to 98% of the Contract Price, less retainages as ENGINEER shall determine in accordance with paragraph 14.7 of the General Conditions.

6.3. Upon final completion of the Work and settlement of all claims, OWNER shall pay the remainder of the Contract Price.

Article 7. CONTRACT DOCUMENTS. The Contract Documents which comprise the contract between OWNER and CONTRACTOR are attached hereto and made a part hereof and consist of the following:

7.1. This Agreement (pages 1 to 4 , inclusive).

7.2. Exhibits to this Agreement (pages 1 to 1 , inclusive). Exhibit A

7.3. CONTRACTOR's Bid and Bonds consisting of 10 pages.

7.4. Notice of Award.

7.5. Information ~~Instructions~~ to Bidders, NSPE ~~Document 1910-12, 1974~~ edition (pages 1 to 5 , inclusive).

7.6. General Conditions, NSPE Document 1910-8, 1974 edition (pages 1 to 25 , inclusive).

7.7. Supplementary Conditions (pages 1 to 12 inclusive).

7.8. Specifications ~~pages — to — inclusive~~, as listed on the attached Exhibit A.

7.9. Drawings as listed on the attached exhibit .. A ______.

7.10. Addenda numbers ....1... to ..3 ...., inclusive, and

7.11. Any Modifications, including Change Orders, duly delivered after execution of this Agreement.

7.12. NONE

Article 8. MISCELLANEOUS.

8.1. Terms used in this Agreement which are defined in Article 1 of the General Conditions shall have th meanings indicated in the General Conditions.

8.2. Neither OWNER nor CONTRACTOR shall, without the prior written consent of the other, assign o sublet in whole or in part his interest under any of the Contract Documents; and, specifically, CONTRACTOR sha not assign any moneys due or to become due without the prior written consent of OWNER.

8.3. OWNER and CONTRACTOR each binds himself, his partners, successors, assigns and legal representative to the other party hereto in respect to all covenants, agreements and obligations contained in the Contract Documen

8.4. The Contract Documents constitute the entire agreement between OWNER and CONTRACTOR and may only be altered, amended or repealed by a duly executed written instrument.

Article 9. OTHER PROVISIONS.

NONE

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above write

OWNER HARRISON COUNTY DEVELOPMENT COMMISSION

By J. F. Boardman Jr.

[CORPORATE SEAL]

Attest

CONTRACTOR L & A CONTRACTING COMPANY

By

[CORPORATE SEAL]

Attest

CONTRACTOR: W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD.

By Rodney Fairchild

~~(CORPORATE SEAL)~~

Witness: Laurel Dunnell

EXHIBIT "A"

SPECIFICATIONS	PAGES
Technical Specifications & Special Provisions Index	1
SP 101 - Definitions and Terms	1
SP 202 - Removal of Existing Bridge across Back Bay	2
SP 203 - Unclassified Excavation	1
SP 323 - In-Grade Preparation	1
SP 604 - Manholes, Inlets and Catch Basins	1
SP 618 - Maintenance of Traffic	2
SP 621 - Engineer's Field Office	2
SP 634 - Highway Illumination System	1
SP 705 - Preformed Neoprene Joint Sealer	3
SP 803 - Bearing Piles	7
SP 804 - Surface Finish	2
SP 810 - Steel Structures	1
SP 814 - Painting Metal Structures	6
SP 821 - Operator's House	10
SP 824 - Concrete Counterweight	3
SP 825 - Counterweight Billets	1
SP 826 - Operating Machinery	7
SP 827 - Electrical Work	28

DRAWINGS	DWG. NO.
Title Sheet	1
Plan Assembly and Estimated Quantities	2
Typical Roadway Sections	3
Plan Profile	4-6
Beam Type Guard Rail Details	7-8
Soil Profile	9
Bridge Layout	10-11
Bridge Structural	12-71
Bridge Mechanical	72-76
Bridge Electrical	77-100
Existing Bridge Plans	101-111

This document has important legal consequences; consultation with an attorney is encouraged with respect to its completion or modification.

REPORT
FILE
NO. 94

STANDARD
GENERAL CONDITIONS
OF THE
CONSTRUCTION CONTRACT

PROFESSIONAL ENGINEERS IN PRIVATE PRACTICE

a practice division of the

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

These General Conditions have been prepared for use with the NSPE Owner-Contractor Agreement (Document 1910-8-A-1 or 1910-8-A-2, 1974 edition) and with the NSPE Instructions to Bidders (Document 1910-12, 1974 edition). These provisions are interrelated and a change in one may necessitate a change in the others.

This document has been approved by the American Consulting Engineers Council, and recommended for use by its members.

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2029 K Street, N.W. Washington, D.C. 20006

NSPE 1910-8 (May, 1974 10M)
Reprinted 1-76 10M

TABLE OF CONTENTS OF GENERAL CONDITIONS

Article Number	Title	Page
1	DEFINITIONS	8
2	PRELIMINARY MATTERS	9
3	CORRELATION, INTERPRETATION AND INTENT OF CONTRACT DOCUMENTS	10
4	AVAILABILITY OF LANDS; PHYSICAL CONDITIONS; REFERENCE POINTS	10
5	BONDS AND INSURANCE	10
6	CONTRACTOR'S RESPONSIBILITIES	12
7	WORK BY OTHERS	15
8	OWNER'S RESPONSIBILITIES	15
9	ENGINEER'S STATUS DURING CONSTRUCTION	16
10	CHANGES IN THE WORK	17
11	CHANGE OF CONTRACT PRICE	17
12	CHANGE OF CONTRACT TIME	19
13	WARRANTY AND GUARANTEE; TESTS AND INSPECTIONS; CORRECTION, REMOVAL OR ACCEPTANCE OF DEFECTIVE WORK	20
14	PAYMENTS AND COMPLETION	21
15	SUSPENSION OF WORK AND TERMINATION	23
16	ARBITRATION	24
17	MISCELLANEOUS	24

INDEX TO GENERAL CONDITIONS

	Article or Paragraph Number
Access to the Work	13.5
Addenda—definition of (see definition of Specifications)	1
Agreement—definition of	1
Agreement, Execution of	2.1
Application for Payment—definition of	1
Application for Payment, Final	14.12
Application for Progress Payment	14.2
Approval of Final Payment	14.13, 14.14
Approval of Payments—in general	14.4 thru 14.7.5
Arbitration	16
Availability of Lands	4.1
Award (Notice of)—defined	1
Before Starting Construction	2.7 thru 2.9
Bid—definition of	1
Bidder—definition of	1
Bonds, Additional and Insurance	5.12
Bonds and Insurance—in general	5
Bonds—definition of	1
Bonds, Delivery of	2.2
Bonds, Performance and Payment	5.1, 5.2
Cash Allowances	11.9
Change Order—definition of	1
Changes in the Work	10
Claims, Waiver of	14.16
Clarifications and Interpretations	9.3
Cleaning	6.29
Completion, Payments and	14
Completion, Substantial	14.8, 14.9
Contract Documents—definition of	1
Contract Price, Change of	11
Contract Price—definition of	1
Contract Time, Change of	12
Contract Time—Commencement of	2.5
Contract Time—definition of	1
Contractor—definition of	1
Contractor May Stop Work or Terminate	15.5
Contractor, Neglected Work by	13.12
Contractor's Continuing Obligation	14.15
Contractor's Fee	11.6
Contractor's Liability Insurance	5.3
Contractor's Pre Start Representations	2.4
Contractor's Responsibilities—in general	6
Contractor's Warranty of Title	14.3
Copies of Documents	2.3
Correction or Removal of Defective Work	13.9
Correction Period, One Year	13.10
Correction, Removal or Acceptance of Defective Work—in general	13
Correlation, Interpretation and Intent of Contract Documents	3
Cost of Work	11.4, 11.5
Costs, Supplemental	11.4.5

Day—definition of 1
Defective Work, Acceptance of 13.11
Defective Work, Correction or Removal of 13.9
Defective Work—definition of 9.4
Defective Work—in general 13
Defective Work, Rejecting 9.4
Definitions 1
Delivery of Bonds 2.2
Disagreements, Decisions by Engineer 9.9, 9.10
Documents, Copies of 2.3
Drawings—definition of 1
Drawings, Record 6.19

Emergencies 6.22
Engineer—definition of 1
Engineer's Responsibilities, Limitations on 9.11 thru 9.13
Engineer's Status During Construction—in general 9
Execution of Agreement 2.1
Fee, Contractor's 11.6
Field Order—definition of 1
Field Orders, issued by Engineer 10.2
Final Application for Payment 14.12
Final Inspection 14.11
Final Payment, Approval of 14.13, 14.14

General Miscellaneous Provisions 17.3 thru 17.7
Giving Notice 17.1
Guarantee 13.1

Indemnification 6.30 thru 6.32
Inspection, Final 14.11
Inspection, Tests and 13.2, 13.3
Insurance, Additional Bonds and 5.12
Insurance, Bonds and—in general 5
Insurance—Certificates of 2.9 and 5
Insurance, Contractor's Liability 5.3
Insurance, Owner's Liability 5.4
Insurance, Property 5.5 thru 5.11
Interpretations and Clarifications 9.3

Labor, Materials and Equipment 6.3 thru 6.6
Laws and Regulations 6.15
Limitations on Engineer's Responsibilities 9.11 thru 9.13
Local Conditions—Contractor's familiarity with 2.4

Materials and Equipment—furnished by Contractor 6.3
Materials or Equipment, Substitute 6.7

Miscellaneous Provisions 17
Modification—definition of 1

Neglected Work by Contractor 13.12
Notice, Giving of 17.1
Notice of Award—definition of 1
Notice to Proceed—definition of 1
Notice to Proceed—giving of. 2.5

"Or-Equal" Items 6.7
Owner—definition of 1
Owner May Stop Work 13.8
Owner May Suspend Work, Terminate 15.1 thru 15.4
Owner's Liability Insurance 5.4
Owner's Representative—Engineer to serve as 9.1
Owner's Responsibilities—in general 8

Partial Utilization 14.10
Patent Fees and Royalties 6.13
Payments and Completion—in general 14
Payments, Approval of 14.4 thru 14.7.5
Performance, Payment and other Bonds 5.1 thru 5.2
Permits 6.14, 6.15
Physical Conditions—Surveys and Reports 4.2
Physical Conditions, Unforeseen 4.3
Preconstruction Conference 2.9
Premises, Use of 6.17, 6.18
Price—Change of Contract 11
Price—Contract—definition of 1
Progress Payment, Applications for 14.2
Progress Schedule 2.8, 14.1
Project—definition of 1
Project Representative, Resident—definition of 1
Project Representative, Resident—provision for 9.8
Project, Starting 2.6
Property Insurance 5.5 thru 5.11
Protection, Safety and 6.20 thru 6.21

Record Drawings 6.19
Reference Points 4.4
Regulations, Laws and 6.15
Rejecting Defective Work 9.4
Removal or Correction of Defective Work 13.9
Resident Project Representative—definition of 1
Resident Project Representative—provision for 9.8
Responsibilities, Contractor's 6
Responsibilities, Owner's 8
Royalties, Patent Fees and 6.13

Safety and Protection 6.20 thru 6.21
Samples 6.23
Schedule of Shop Drawing Submissions 2.8, 14.1
Schedule of Values 14.1
Shop Drawings and Samples 6.23 thru 6.28
Shop Drawings—definition of 1
Site inspection—by Contractor 2.8
Site, Visits to—by Engineer 9.2
Specifications—definition of 1
Starting Construction, Before 2.7 thru 2.9
Stopping Work—by Contractor 15.5
Stopping Work—by Owner 13.8
Subcontractor—definition of 1
Subcontractors—in general 6.8 thru 6.12
Substantial Completion—certification of 14.8
Substantial Completion—definition of 1
Substitute Materials or Equipment 6.7
Subsurface Conditions 4.2, 4.3

Supplemental Costs 11.4.5
Surety—consent to payment 14.12, 14.14
Surety—qualification of 5.1, 5.2
Suspending Work, by Owner 15.1
Suspension of Work and Termination—in general 15
Superintendent—Contractor's 6.2
Supervision and Superintendence 6.1, 6.2

Taxes 6.16
Termination—by Contractor 15.5
Termination—by Owner 15.2 thru 15.4
Termination, Suspension of Work and—in general 15
Tests and Inspections 13.2, 13.3, 13.7
Time, Change of Contract 12
Time, Computation of 17.2
Time, Contract—definition of 1

Uncovering Work 13.6, 13.7
Use of Premises 6.17, 6.18

Values, Schedule of 14.1
Visits to Site—by Engineer 9.2

Waiver of Claims 14.16
Warranty and Guarantee—by Contractor 13.1
Warranty of Title, Contractor's 14.3
Work, Access to 13.5
Work by Others—in general 7
Work, Cost of 11.4
Work—definition of 1
Work, Neglected by Contractor 13.12
Work, Stopping by Contractor 15.5
Work, Stopping by Owner 15.1 thru 15.4

GENERAL CONDITIONS

ARTICLE 1—DEFINITIONS

Wherever used in these General Conditions or in the other Contract Documents, the following terms have the meanings indicated which are applicable to both the singular and plural thereof.

Agreement—The written agreement between OWNER and CONTRACTOR covering the Work to be performed, other Contract Documents are attached to the Agreement.

Application for Payment—The form furnished by ENGINEER which is to be used by CONTRACTOR in requesting progress payments and which is to include the schedule of values required by paragraph 14.1 and an affidavit of CONTRACTOR that progress payments theretofore received on account of the Work have been applied by CONTRACTOR to discharge in full all of CONTRACTOR's obligations reflected in prior Applications for Payment.

Bid—The offer or proposal of the Bidder submitted on the prescribed form setting forth the prices for the Work to be performed.

Bidder—Any person, firm or corporation submitting a Bid for the Work.

Bonds—Bid, performance and payment bonds and other instruments of security, furnished by CONTRACTOR and his surety in accordance with the Contract Documents.

Change Order—A written order to CONTRACTOR signed by OWNER authorizing an addition, deletion or revision in the Work, or an adjustment in the Contract Price or the Contract Time issued after execution of the Agreement.

Contract Documents—The Agreement, Addenda (whether issued prior to the opening of Bids or the execution of the Agreement), Instructions to Bidders, CONTRACTOR's Bid, the Bonds, the Notice of Award, these General Conditions, the Supplementary Conditions, the Specifications, Drawings and Modifications.

Contract Price—The total moneys payable to CONTRACTOR under the Contract Documents.

Contract Time—The number of days stated in the Agreement for the completion of the Work, computed as provided in paragraph 17.2.

CONTRACTOR—The person, firm or corporation with whom OWNER has executed the Agreement.

Day—A calendar day of twenty-four hours measured from midnight to the next midnight.

Drawings—The drawings which show the character and scope of the Work to be performed and which have been prepared or approved by ENGINEER and are referred to in the Contract Documents.

ENGINEER—The person, firm or corporation named as such in the Agreement.

Field Order—A written order issued by ENGINEER which clarifies or interprets the Contract Documents in accordance with paragraph 9.3 or orders minor changes in the Work in accordance with paragraph 10.2.

Modification—(a) A written amendment of the Contract Documents signed by both parties, (b) a Change Order, (c) a written clarification or interpretation issued by ENGINEER in accordance with paragraph 9.3 or (d) a written order for a minor change or alteration in the Work issued by ENGINEER pursuant to paragraph 10.2. A Modification may only be issued after execution of the Agreement.

Notice of Award—The written notice by OWNER to the apparent successful Bidder stating that upon compliance with the conditions precedent to be fulfilled by him within the time specified, OWNER will execute and deliver the Agreement to him.

Notice to Proceed—A written notice given by OWNER to CONTRACTOR (with a copy to ENGINEER) fixing the date on which the Contract Time will commence to run and on which CONTRACTOR shall start to perform his obligations under the Contract Documents.

OWNER—A public body or authority, corporation, association, partnership, or individual for whom the Work is to be performed.

Project—The entire construction to be performed as provided in the Contract Documents.

Resident Project Representative—The authorized representative of ENGINEER who is assigned to the Project site or any part thereof.

Shop Drawings—All drawings, diagrams, illustrations brochures, schedules and other data which are prepare by CONTRACTOR, a Subcontractor, manufacturer, supplier or distributor and which illustrate the equipment material or some portion of the Work.

Specifications—Those portions of the Contract Document consisting of written technical descriptions of materia equipment, construction systems, standards and workmanship as applied to the Work. The specifications are customarily organized in 16 divisions in accordance with th Uniform System for Construction Specifications endorse by the Construction Specifications Institute. [*Note: the ter "Technical Provisions" formerly described what is no referred to as the Specifications. For uniformity with th usage of other professional societies the term "Proje Manual" is used to describe the volume formerly referre to as "The Specifications." The Project Manual conta documents concerning bidding requirements which in ge eral govern transactions prior to the execution of t Agreement (such as the Invitation to Bid, Instructions Bidders, Bid Bonds and Notice of Award) and the oth portions of the Contract Documents.*]

Subcontractor—An individual, firm or corporation havi a direct contract with CONTRACTOR or with any oth Subcontractor for the performance of a part of the Wo at the site.

Substantial Completion—The date as certified by ENGINEER when the construction of the Project or a specified part thereof is sufficiently completed, in accordance with the Contract Documents, so that the Project or specified part can be utilized for the purposes for which it was intended; or if there be no such certification, the date when final payment is due in accordance with paragraph 14.13.

Work—Any and all obligations, duties and responsibilities necessary to the successful completion of the Project assigned to or undertaken by CONTRACTOR under the Contract Documents, including all labor, materials, equipment and other incidentals, and the furnishing thereof.

ARTICLE 2—PRELIMINARY MATTERS

Execution of Agreement:

2.1. At least three counterparts of the Agreement and such other Contract Documents as practicable will be executed and delivered by CONTRACTOR to OWNER within fifteen days of the Notice of Award; and OWNER will execute and deliver one counterpart to CONTRACTOR within ten days of receipt of the executed Agreement from CONTRACTOR. ENGINEER will identify those portions of the Contract Documents not so signed and such identification will be binding on all parties. OWNER, CONTRACTOR and ENGINEER shall each receive an executed counterpart of the Contract Documents and additional conformed copies as required.

Delivery of Bonds:

2.2. When he delivers the executed Agreements to OWNER, CONTRACTOR shall also deliver to OWNER such Bonds as he may be required to furnish in accordance with paragraph 5.1.

Copies of Documents:

2.3. OWNER shall furnish to CONTRACTOR up to ten copies (unless otherwise provided in the Supplementary Conditions) of the Contract Documents as are reasonably necessary for the execution of the Work. Additional copies will be furnished, upon request, at the cost of reproduction.

Contractor's Pre-Start Representation:

2.4. CONTRACTOR represents that he has familiarized himself with, and assumes full responsibility for having familiarized himself with the nature and extent of the Contract Documents, Work, locality, and with all local conditions and federal, state and local laws, ordinances, rules and regulations that may in any manner affect performance of the Work, and represents that he has correlated his study and observations with the requirements of the Contract Documents. CONTRACTOR also represents that he has studied all surveys and investigation reports of subsurface and latent physical conditions referred to in the General Requirements (Division 1) of the Specifications and made such additional surveys and investigations as he deems necessary for the performance of the Work at the Contract Price in accordance with the requirements of the Contract Documents and that he has correlated the results of all such data with the requirements of the Contract Documents.

Commencement of Contract Time: Notice to Proceed:

2.5. The Contract Time will commence to run on the thirtieth day after the day on which the executed Agreement is delivered by OWNER to CONTRACTOR; or, if a Notice to Proceed is given, on the day indicated in the Notice to Proceed; but in no event shall the Contract Time commence to run later than the ninetieth day after the day of Bid opening or the thirtieth day after the day on which OWNER delivers the executed Agreement to CONTRACTOR. A Notice to Proceed may be given at any time within thirty days after the day on which OWNER delivers the executed Agreement to CONTRACTOR.

Starting the Project:

2.6. CONTRACTOR shall start to perform his obligations under the Contract Documents on the date when the Contract Time commences to run. No Work shall be done at the site prior to the date on which the Contract Time commences to run.

Before Starting Construction:

2.7. Before undertaking each part of the Work, CONTRACTOR shall carefully study and compare the Contract Documents and check and verify pertinent figures shown thereon and all applicable field measurements. He shall at once report in writing to ENGINEER any conflict, error or discrepancy which he may discover; however, he shall not be liable to OWNER or ENGINEER for his failure to discover any conflict, error or discrepancy in the Drawings or Specifications.

2.8. Within ten days after delivery of the executed Agreement by OWNER to CONTRACTOR, CONTRACTOR shall submit to ENGINEER for approval, an estimated progress schedule indicating the starting and completion dates of the various stages of the Work, and a preliminary schedule of Shop Drawing submissions.

2.9. Before starting the Work at the site, CONTRACTOR shall furnish OWNER and ENGINEER certificates of insurance as required by Article 5. Within twenty days after delivery of the executed Agreement by OWNER to CONTRACTOR, but before starting the Work at the site, a conference will be held to review the above schedules, to establish procedures for handling Shop Drawings and other submissions and for processing Applications for Payment, and to establish a working understanding between the parties as to the Project. Present at the conference will be OWNER or his representative, ENGINEER, Resident Project Representatives, CONTRACTOR and his Superintendent.

ARTICLE 3—CORRELATION, INTERPRETATION AND INTENT OF CONTRACT DOCUMENTS

3.1. It is the intent of the Specifications and Drawings to describe a complete Project to be constructed in accordance with the Contract Documents. The Contract Documents comprise the entire Agreement between OWNER and CONTRACTOR. They may be altered only by a Modification.

3.2. The Contract Documents are complementary; what is called for by one is as binding as if called for by all. If CONTRACTOR finds a conflict, error or discrepancy in the Contract Documents, he shall call it to ENGINEER's attention in writing at once and before proceeding with the Work affected thereby; however, he shall not be liable to OWNER or ENGINEER for his failure to discover any conflict, error or discrepancy in the Specifications or Drawings. In resolving such conflicts, errors and discrepancies, the documents shall be given precedence in the following order: Agreement, Modifications, Addenda, Supplementary Conditions, Instructions to Bidders, General Conditions, Specifications and Drawings. Figure dimensions on Drawings shall govern over scale dimensions, and detailed Drawings shall govern over general Drawings. Any Work that may reasonably be inferred from the Specifications or Drawings as being required to produce the intended result shall be supplied whether or not it is specifically called for. Work, materials or equipment described in words which so applied have a well-known technical or trade meaning shall be deemed to refer to such recognized standards.

ARTICLE 4—AVAILABILITY OF LANDS; PHYSICAL CONDITIONS; REFERENCE POINTS

Availability of Lands:

4.1. OWNER shall furnish, as indicated in the Contract Documents and not later than the date when needed by CONTRACTOR, the lands upon which the Work is to be done, rights-of-way for access thereto, and such other lands which are designated for the use of CONTRACTOR. Easements for permanent structures or permanent changes in existing facilities will be obtained and paid for by OWNER, unless otherwise specified in the Contract Documents. If CONTRACTOR believes that any delay in OWNER's furnishing these lands or easements entitles him to an extension of the Contract Time, he may make a claim therefor as provided in Article 12. CONTRACTOR shall provide for all additional lands and access thereto that may be required for temporary construction facilities or storage of materials and equipment.

Physical Conditions—Surveys and Reports:

4.2. Reference is made to the General Requirements (Division 1) of the Specifications for identification of those surveys and investigation reports of subsurface and latent physical conditions at the Project site or otherwise affecting performance of the Work which have been relied upon by ENGINEER in preparation of the Drawings and Specifications.

Unforeseen Physical Conditions:

4.3. CONTRACTOR shall promptly notify OWNER and ENGINEER in writing of any subsurface or latent physical conditions at the site differing materially from those indicated in the Contract Documents. ENGINEER will promptly investigate those conditions and advise OWNER in writing if further surveys or subsurface tests are necessary. Promptly thereafter, OWNER shall obtain the necessary additional surveys and tests and furnish copies to ENGINEER and CONTRACTOR. If ENGINEER finds that the results of such surveys or tests indicate that there are subsurface or latent physical condition which differ materially from those intended in the Contract Documents, and which could not reasonably have been anticipated by CONTRACTOR, a Change Orde shall be issued incorporating the necessary revisions.

Reference Points:

4.4. OWNER shall provide engineering surveys fo construction to establish reference points which in hi judgment are necessary to enable CONTRACTOR t proceed with the Work. CONTRACTOR shall be responsible for surveying and laying out the Work (unles otherwise provided in the Supplementary Conditions), an shall protect and preserve the established reference point and shall make no changes or relocations without the prio written approval of OWNER. He shall report to ENGINEER whenever any reference point is lost or destroye or requires relocation because of necessary changes i grades or locations. CONTRACTOR shall replace and accurately relocate all reference points so lost, destroyed o moved.

ARTICLE 5—BONDS AND INSURANCE

Performance, Payment and Other Bonds:

5.1. CONTRACTOR shall furnish performance an payment Bonds as security for the faithful performanc and payment of all his obligations under the Contrac Documents. These Bonds shall be in amounts at least equa to the Contract Price, and (except as otherwise provide in the Supplementary Conditions) in such form and wit such sureties as are licensed to conduct business in th state where the Project is located and are named in th current list of "Surety Companies Acceptable on Federa Bonds" as published in the Federal Register by the Aud Staff Bureau of Accounts, U.S. Treasury Department.

5.2. If the surety on any Bond furnished by CONTRACTOR is declared a bankrupt or becomes insolven or its right to do business is terminated in any state wher any part of the Project is located is revoked, CONTRACTOR shall within five days thereafter substitute anothe Bond and surety, both of which shall be acceptable t OWNER.

Contractor's Liability Insurance

5.3. CONTRACTOR shall purchase and maintain such insurance as will protect him from claims under workmen's compensation laws, disability benefit laws or other similar employee benefit laws; from claims for damages because of bodily injury, occupational sickness or disease, or death of his employees, and claims insured by usual personal injury liability coverage; from claims for damages because of bodily injury, sickness or disease, or death of any person other than his employees including claims insured by usual personal injury liability coverage; and from claims for injury to or destruction of tangible property, including loss of use resulting therefrom—any or all of which may arise out of or result from CONTRACTOR's operations under the Contract Documents, whether such operations be by himself or by any Subcontractor or anyone directly or indirectly employed by any of them or for whose acts any of them may be legally liable. This insurance shall include the specific coverages and be written for not less than any limits of liability and maximum deductibles specified in the Supplementary Conditions or General Requirements (Division 1) or required by law, whichever is greater, shall include contractual liability insurance and shall include OWNER and ENGINEER as additional insured parties. Before starting the Work, CONTRACTOR shall file with OWNER and ENGINEER certificates of such insurance, acceptable to OWNER; these certificates shall contain a provision that the coverage afforded under the policies will not be cancelled or materially changed until at least fifteen days' prior written notice has been given to OWNER and ENGINEER

Owner's Liability Insurance

5.4. OWNER shall be responsible for purchasing and maintaining his own liability insurance and, at his option, may purchase and maintain such insurance as will protect him against claims which may arise from operations under the Contract Documents.

Property Insurance:

5.5. Unless otherwise provided, OWNER shall purchase and maintain property insurance upon the Project to the full insurable value thereof. This insurance shall include the interests of OWNER, CONTRACTOR and Subcontractors in the Work, shall insure against the perils of Fire, Extended Coverage, Vandalism and Malicious Mischief and such other perils as may be specified in the Supplementary Conditions or General Requirements (Division 1) and shall include damages, losses and expenses arising out of or resulting from any insured loss or incurred in the repair or replacement of any insured property (including fees and charges of engineers, architects, attorneys and other professionals).

5.6. OWNER shall purchase and maintain such steam boiler and machinery insurance as may be required by the Supplementary Conditions or by law. This insurance shall include the interests of OWNER, CONTRACTOR and Subcontractors in the Work.

5.7. Any insured loss under the policies of insurance required by paragraphs 5.5 and 5.6 is to be adjusted with OWNER and made payable to OWNER as trustee for the insureds, as their interests may appear, subject to the requirements of any applicable mortgage clause and of paragraph 5.11.

5.8. OWNER shall file a copy of all policies with CONTRACTOR before an exposure to loss may occur. If OWNER does not intend to purchase such insurance, he shall inform CONTRACTOR in writing prior to commencement of the Work. CONTRACTOR may then effect insurance which will protect the interests of himself and his Subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to OWNER. If CONTRACTOR is damaged by failure of OWNER to purchase or maintain such insurance and so to notify CONTRACTOR, then OWNER shall bear reasonable costs properly attributable thereto.

5.9. If CONTRACTOR requests in writing that other special insurance be included in the property insurance policy, OWNER shall, if possible, include such insurance, and the cost thereof shall be charged to CONTRACTOR by appropriate Change Order.

5.10. OWNER and CONTRACTOR waive all rights against each other for damages caused by fire or other perils to the extent covered by insurance provided under paragraphs 5.5 through 5.11, inclusive, except such rights as they may have to the proceeds of such insurance held by OWNER as trustee. CONTRACTOR shall require similar waivers by Subcontractors in accordance with paragraph 6.12.

5.11. OWNER as trustee shall have power to adjust and settle any loss with the insurers unless one of the parties in interest shall object in writing within five days after the occurrence of loss to OWNER's exercise of this power, and if such objection be made, arbitrators shall be chosen as provided in Article 16. OWNER as trustee shall, in that case, make settlement with the insurers in accordance with the directions of such arbitrators. If distribution of the insurance proceeds by arbitration is required, the arbitrators will direct such distribution.

Additional Bonds and Insurance:

5.12. Prior to delivery of the executed Agreement by OWNER to CONTRACTOR, OWNER may require CONTRACTOR to furnish such other Bonds and such additional insurance, in such form and with such [illegible] or insurers as OWNER may require. If such other Bonds or such other insurance are specified by written instructions given prior to opening of Bids, the premiums shall be paid by CONTRACTOR; if subsequent thereto, they shall be paid by OWNER (except as otherwise provided in paragraph 6.7).

ARTICLE 6—CONTRACTOR'S RESPONSIBILITIES

Supervision and Superintendence:

6.1. CONTRACTOR shall supervise and direct the Work efficiently and with his best skill and attention. He shall be solely responsible for the means, methods, techniques, sequences and procedures of construction, but he shall not be solely responsible for the negligence of others in the design or selection of a specific means, method, technique, sequence or procedure of construction which is indicated in and required by the Contract Documents. CONTRACTOR shall be responsible to see that the finished Work complies accurately with the Contract Documents.

6.2. CONTRACTOR shall keep on the Work at all times during its progress a competent resident superintendent, who shall not be replaced without written notice to OWNER and ENGINEER except under extraordinary circumstances. The superintendent will be CONTRACTOR's representative at the site and shall have authority to act on behalf of CONTRACTOR. All communications given to the superintendent shall be as binding as if given to CONTRACTOR.

Labor, Materials and Equipment:

6.3. CONTRACTOR shall provide competent, suitably qualified personnel to survey and lay out the Work and perform construction as required by the Contract Documents. He shall at all times maintain good discipline and order at the site.

6.4. CONTRACTOR shall furnish all materials, equipment, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water and sanitary facilities and all other facilities and incidentals necessary for the execution, testing, initial operation and completion of the Work.

6.5. All materials and equipment shall be new, except as otherwise provided in the Contract Documents. If required by ENGINEER, CONTRACTOR shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

6.6. All materials and equipment shall be applied, installed, connected, erected, used, cleaned and conditioned in accordance with the instructions of the applicable manufacturer, fabricator or processors, except as otherwise provided in the Contract Documents.

Substitute Materials or Equipment:

6.7. If the General Requirements (Division 1) of the Specifications, law, ordinance or applicable rules or regulations permit CONTRACTOR to furnish or use a substitute that is equal to any material or equipment specified, and if CONTRACTOR wishes to furnish or use a proposed substitute, he shall, prior to the conference called for by paragraph 2.9 (unless another time is provided in the General Requirements), make written application to ENGINEER for approval of such a substitute certifying in writing that the proposed substitute will perform adequately the functions called for by the general design, be similar and of equal substance to that specified and be suited to the same use and capable of performing the same function as that specified; stating whether or not its incorporation in or use in connection with the Project is subject to the payment of any license fee or royalty; and identifying all variations of the proposed substitute from that specified and indicating available maintenance service. No substitute shall be ordered or installed without the written approval of ENGINEER who will be the judge of equality and may require CONTRACTOR to furnish such other data about the proposed substitute as he considers pertinent. No substitute shall be ordered or installed without such performance guaranties and bonds as OWNER may require which shall be furnished at CONTRACTOR's expense.

Concerning Subcontractors:

6.8. CONTRACTOR shall not employ any Subcontractor or other person or organization (including those who are to furnish the principal items of materials or equipment), whether initially or as a substitute, against whom OWNER or ENGINEER may have reasonable objection. A Subcontractor or other person or organization identified in writing to OWNER and ENGINEER by CONTRACTOR prior to the Notice of Award and not objected to in writing by OWNER or ENGINEER prior to the Notice of Award will be deemed acceptable to OWNER and ENGINEER. Acceptance of any Subcontractor, other person or organization by OWNER or ENGINEER shall not constitute a waiver of any right of OWNER or ENGINEER to reject defective Work or Work not in conformance with the Contract Documents. If OWNER or ENGINEER after due investigation has reasonable objection to any Subcontractor, other person or organization proposed by CONTRACTOR after the Notice of Award, CONTRACTOR shall submit an acceptable substitute and the Contract Price shall be increased or decreased by the difference in cost occasioned by such substitution, and an appropriate Change Order shall be issued. CONTRACTOR shall not be required to employ any Subcontractor, other person or organization against whom he has reasonable objection. CONTRACTOR shall not without the consent of OWNER and ENGINEER make any substitution for any Contractor, other person or organization who has been accepted by OWNER and ENGINEER unless ENGINEER determines that there is good cause for doing so.

6.9. CONTRACTOR shall be fully responsible for all acts and omissions of his Subcontractors and of persons and organizations directly or indirectly employed by them and of persons and organizations for whose acts any of them may be liable to the same extent that he is responsible for the acts and omissions of persons directly employed by him. Nothing in the Contract Documents shall create any contractual relationship between OWNER or ENGINEER and any Subcontractor or other person or organization having a direct contract with CONTRACTOR, nor shall it create any obligation on the part of

OWNER or ENGINEER to pay or to see to the payment of any moneys due any Subcontractor or other person or organization, except as may otherwise be required by law. OWNER or ENGINEER may furnish to any Subcontractor or other person or organization, to the extent practicable, evidence of amounts paid to CONTRACTOR on account of specific Work done in accordance with the schedule of values.

6.10. The divisions and sections of the Specifications and the identifications of any Drawings shall not control CONTRACTOR in dividing the Work among Subcontractors or delineating the Work to be performed by any specific trade.

6.11. CONTRACTOR agrees to bind specifically every Subcontractor to the applicable terms and conditions of the Contract Documents for the benefit of OWNER.

6.12. All Work performed for CONTRACTOR by a Subcontractor shall be pursuant to an appropriate agreement between CONTRACTOR and the Subcontractor which shall contain provisions that waive all rights the contracting parties may have against one another for damages caused by fire or other perils covered by insurance provided in accordance with paragraphs 5.5 through 5.11, inclusive, except such rights as they may have to the proceeds of such insurance held by OWNER as trustee under paragraph 5.13. CONTRACTOR shall pay each Subcontractor a just share of any insurance moneys received by CONTRACTOR under paragraphs 5.5 through 5.11, inclusive.

Patent Fees and Royalties:

6.13. CONTRACTOR shall pay all license fees and royalties and assume all costs incident to the use in the performance of the Work of any invention, design, process, product or device which is the subject of patent rights or copyrights held by others. If a particular invention, design, process, product or device is specified in the Contract Documents for use in the performance of the Work and if to the actual knowledge of OWNER or ENGINEER its use is subject to patent rights or copyrights calling for the payment of any license fee or royalty to others, the existence of such rights shall be disclosed by OWNER in the Contract Documents. CONTRACTOR shall indemnify and hold harmless OWNER and ENGINEER and anyone directly or indirectly employed by either of them from and against all claims, damages, losses and expenses (including attorneys' fees) arising out of any infringement of patent rights or copyrights incident to the use in the performance of the Work or resulting from the incorporation in the Work of any invention, design, process, product or device not specified in the Contract Documents, and shall defend all such claims in connection with any alleged infringement of such rights.

Permits:

6.14. CONTRACTOR shall obtain and pay for all construction permits and licenses and shall pay all governmental charges and inspection fees necessary for the prosecution of the Work, which are applicable at the time of his Bid. OWNER shall assist CONTRACTOR, when necessary, in obtaining such permits and licenses. CONTRACTOR shall also pay all public utility charges.

Laws and Regulations:

6.15. CONTRACTOR shall give all notices and comply with all laws, ordinances, rules and regulations applicable to the Work. If CONTRACTOR observes that the Specifications or Drawings are at variance therewith, he shall give ENGINEER prompt written notice thereof, and any necessary changes shall be adjusted by an appropriate Modification. If CONTRACTOR performs any Work knowing it to be contrary to such laws, ordinances, rules and regulations, and without such notice to ENGINEER, he shall bear all costs arising therefrom; however, it shall not be his primary responsibility to make certain that the Specifications and Drawings are in accordance with such laws, ordinances, rules and regulations.

Taxes:

6.16. CONTRACTOR shall pay all sales, consumer, use and other similar taxes required to be paid by him in accordance with the law of the place where the Work is to be performed.

Use of Premises:

6.17. CONTRACTOR shall confine his equipment, the storage of materials and equipment and the operations of his workmen to areas permitted by law, ordinances, permits, or the requirements of the Contract Documents, and shall not unreasonably encumber the premises with materials or equipment.

6.18. CONTRACTOR shall not load nor permit any part of any structure to be loaded with weights that will endanger the structure, nor shall he subject any part of the Work to stresses or pressures that will endanger it.

Record Drawings:

6.19. CONTRACTOR shall keep one record copy of all Specifications, Drawings, Addenda, Modifications, and Shop Drawings at the site in good order and annotated to show all changes made during the construction process. These shall be available to ENGINEER and shall be delivered to him for OWNER upon completion of the Project. [*Note: Further provisions in respect of such record drawings may be included in the General Requirements (Division 1).*]

Safety and Protection:

6.20. CONTRACTOR shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. He shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to:

6.20.1. all employees on the Work and other persons who may be affected thereby, 6.20.2. all the Work and all materials or equipment to be incorporated therein, whether in storage on or off the site, and

6.20.3. other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

CONTRACTOR shall comply with all applicable laws, ordinances, rules, regulations and orders of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss. He shall erect and maintain, as required by the conditions and progress of the Work, all necessary safeguards for its safety and protection. He shall notify owners of adjacent utilities when prosecution of the Work may affect them. All damage, injury or loss to any property referred to in paragraph 6.20.2 or 6.20.3 caused, directly or indirectly, in whole or in part, by CONTRACTOR, any Subcontractor or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, shall be remedied by CONTRACTOR (except damage or loss attributable to the fault of Drawings or Specifications or to the acts or omissions of OWNER or ENGINEER or anyone employed by either of them or anyone for whose acts either of them may be liable, and not attributable, directly or indirectly, in whole or in part, to the fault or negligence of CONTRACTOR). CONTRACTOR's duties and responsibilities for the safety and protection of the Work shall continue until such time as all the Work is completed and ENGINEER has issued a notice to OWNER and CONTRACTOR in accordance with paragraph 14.13 that Work is acceptable.

6.21. CONTRACTOR shall designate a responsible member of his organization at the site whose duty shall be the prevention of accidents. This person shall be CONTRACTOR's superintendent unless otherwise designated in writing by CONTRACTOR to OWNER.

Emergencies

6.22. In emergencies affecting the safety of persons or the Work or property at the site or adjacent thereto, CONTRACTOR, without special instruction or authorization from ENGINEER or OWNER, is obligated to act, at his discretion, to prevent threatened damage, injury or loss. He shall give ENGINEER prompt written notice of any significant changes in the Work or deviations from the Contract Documents caused thereby, and a Change Order shall thereupon be issued covering the changes and deviations involved. If CONTRACTOR believes that additional work done by him in an emergency which arose from causes beyond his control entitles him to an increase in the Contract Price or an extension of the Contract Time, he may make a claim therefor as provided in Articles 11 and 12.

Shop Drawings and Samples

6.23. After checking and verifying all field measurements, CONTRACTOR shall submit to ENGINEER for approval, in accordance with the accepted schedule of Shop Drawing submissions (see paragraph 2.8) five copies (or at ENGINEER's option, one reproducible copy) of all Shop Drawings, which shall have been checked by and stamped with the approval of CONTRACTOR and identified as ENGINEER may require. The data shown on the Shop Drawings will be complete with respect to dimensions, design criteria, materials of construction and the like to enable ENGINEER to review the information as required.

6.24. CONTRACTOR shall also submit to ENGINEER for approval with such promptness as to cause no delay in Work, all samples required by the Contract Documents. All samples will have been checked by and stamped with the approval of CONTRACTOR, identified clearly as to material, manufacturer, any pertinent catalog numbers and the use for which intended.

6.25. At the time of each submission, CONTRACTOR shall in writing call ENGINEER's attention to any deviations that the Shop Drawing or sample may have from the requirements of the Contract Documents.

6.26. ENGINEER will review and approve with reasonable promptness Shop Drawings and samples, but his review and approval shall be only for conformance with the design concept of the Project and for compliance with the information given in the Contract Documents. The approval of a separate item as such will not indicate approval of the assembly in which the item functions. CONTRACTOR shall make any corrections required by ENGINEER and shall return the required number of corrected copies of Shop Drawings and resubmit new samples until approved. CONTRACTOR shall direct specific attention in writing or on resubmitted Shop Drawings to revisions other than the corrections called for by ENGINEER on previous submissions. CONTRACTOR's stamp of approval on any Shop Drawing or sample shall constitute a representation to OWNER and ENGINEER that CONTRACTOR has either determined and verified all quantities, dimensions, field construction criteria, materials, catalog numbers, and similar data or he assumes full responsibility for doing so, and that he has reviewed or coordinated each Shop Drawing or sample with the requirements of the Work and the Contract Documents.

6.27. Where a Shop Drawing or sample submission is required by the Specifications, no related Work shall be commenced until the submission has been approved by ENGINEER. A copy of each approved Shop Drawing and each approved sample shall be kept in good order by CONTRACTOR at the site and shall be available to ENGINEER.

6.28. ENGINEER's approval of Shop Drawings or samples shall not relieve CONTRACTOR from his responsibility for any deviations from the requirements of the Contract Documents unless CONTRACTOR has in writing called ENGINEER's attention to such deviation at the time of submission and ENGINEER has given written approval to the specific deviation; nor shall any approval by ENGINEER relieve CONTRACTOR from responsibility for errors or omissions in the Shop Drawings.

[Note: Further provisions in respect to Shop Drawings and samples may be included in the General Requirements (Division 1).]

Cleaning

6.29. CONTRACTOR shall keep the premises free from accumulations of waste materials, rubbish and other debris resulting from the Work, and at the completion of the Work he shall remove all waste materials, rubbish and debris from and about the premises as well as all tools, construction equipment and machinery, and surplus materials, and shall leave the site clean and ready for occupancy by OWNER. CONTRACTOR shall restore to their original condition those portions of the site not designated for alteration by the Contract Documents. *[Note: Further provisions in respect of cleaning may be included in the General Requirements (Division 1).]*

Indemnification

6.30. CONTRACTOR shall indemnify and hold harmless OWNER and ENGINEER and their agents and employees from and against all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom and (b) is caused in whole or in part by any negligent act or omission of CONTRACTOR, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.

6.31. In any and all claims against OWNER or ENGINEER or any of their agents or employees by any employee of CONTRACTOR, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under paragraph 6.30 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for CONTRACTOR or any Subcontractor under workmen's compensation acts, disability benefit acts or other employee benefit acts.

6.32. The obligations of CONTRACTOR under paragraph 6.30 shall not extend to the liability of ENGINEER, his agents or employees arising out of (a) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications or (b) the giving of or the failure to give directions or instructions by ENGINEER, his agents or employees provided such giving or failure to give is the primary cause of injury or damage.

ARTICLE 7—WORK BY OTHERS

7.1. OWNER may perform additional work related to the Project by himself, or he may let other direct contracts therefor which shall contain General Conditions similar to these. CONTRACTOR shall afford the other contractors who are parties to such direct contracts (or OWNER, if he is performing the additional work himself), reasonable opportunity for the introduction and storage of materials and equipment and the execution of work, and shall properly connect and coordinate his Work with theirs.

7.2. If any part of CONTRACTOR's Work depends for proper execution or results upon the work of any such other contractor (or OWNER), CONTRACTOR shall inspect and promptly report to ENGINEER in writing any defects or deficiencies in such work that render it unsuitable for such proper execution and results. His failure so to report shall constitute an acceptance of the other work as fit and proper for the relationship of his Work except as to defects and deficiencies which may appear in the other work after the execution of his Work.

7.3. CONTRACTOR shall do all cutting, fitting and patching of his Work that may be required to make its several parts come together properly and fit it to receive or be received by such other work. CONTRACTOR shall not endanger any work of others by cutting, excavating or otherwise altering their work and will only cut or alter their work with the written consent of ENGINEER and of the other contractors whose work will be affected.

7.4. If the performance of additional work by other contractors or OWNER is not noted in the Contract Documents prior to the execution of the contract, written notice thereof shall be given to CONTRACTOR prior to starting any such additional work. If CONTRACTOR believes that the performance of such additional work by OWNER or others involves him in additional expense or entitles him to an extension of the Contract Time, he may make a claim therefor as provided in Articles 11 and 12.

ARTICLE 8—OWNER'S RESPONSIBILITIES

8.1. OWNER shall issue all comm[illegible] to CONTRACTOR through ENGINEER.

8.2. In case of termination of the employment of ENGINEER, OWNER shall appoint [illegible] whom CONTRACTOR makes no [illegible] whose status under the Contract Documents [illegible] of the former ENGINEER. Any dispute in connection with such appointment shall be subject to arbi[illegible]

8.3. OWNER shall furnish the data required of him under the Contract Documents promptly and shall make payments to CONTRACTOR promptly after they are due as provided in paragraphs 14.4 and 14.1[illegible]

8.4. OWNER's duties in respect of [illegible] lands and easements and providing engineering [illegible] establish [illegible] reference points are set forth in paragraphs 4.1 and 4.4. Paragraph 4.2 refers to OWNER's identifying and making available to CONTRACTOR copies of surveys and investigation reports of subsurface and latent physical conditions at the site or otherwise affecting performance of the Work which have been relied upon by ENGINEER in preparing the Drawings and Specifications.

8.5. OWNER's responsibilities in respect of liability and property insurance are set forth in paragraph 5.4 and 5.5.

8.6. In addition to his rights to request changes in the Work in accordance with Article 10, OWNER (especially in certain instances as provided in paragraph 10.4) shall be obligated to execute Change Orders.

8.7. OWNER's responsibility in respect of certain inspections, tests and approvals is set forth in paragraph 13.2.

8.8. In connection with OWNER's right to stop Work or suspend Work, see paragraphs 13.8 and 15.1. Paragraph 15.2 deals with OWNER's right to terminate services of CONTRACTOR under certain circumstances.

ARTICLE 9—ENGINEER'S STATUS DURING CONSTRUCTION

Owner's Representative:

9.1. ENGINEER will be OWNER's representative during the construction period. The duties and responsibilities and the limitations of authority of ENGINEER as OWNER's representative during construction are set forth in Articles 1 through 17 of these General Conditions and shall not be extended without written consent of OWNER and ENGINEER.

Visits to Site:

9.2. ENGINEER will make periodic visits to the site to observe the progress and quality of the executed Work and to determine, in general, if the Work is proceeding in accordance with the Contract Documents. He will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. His efforts will be directed toward providing assurance for OWNER that the completed Project will conform to the requirements of the Contract Documents. On the basis of his on-site observations as an experienced and qualified design professional, he will keep OWNER informed of the progress of the Work and will endeavor to guard OWNER against defects and deficiencies in the Work of contractors.

Clarifications and Interpretations:

9.3. ENGINEER will issue with reasonable promptness such written clarifications or interpretations of the Contract Documents (in the form of Drawings or otherwise) as he may determine necessary, which shall be consistent with or reasonably inferable from the overall intent of the Contract Documents. If CONTRACTOR believes that a written clarification and interpretation entitles him to an increase in the Contract Price, he may make a claim therefor as provided in Article 11.

Rejecting Defective Work:

9.4. ENGINEER will have authority to disapprove or reject Work which is "defective" (which term is hereinafter used to describe Work that is unsatisfactory, faulty or defective, or does not conform to the requirements of the Contract Documents or does not meet the requirements of any inspection, test or approval referred to in paragraph 13.2 or has been damaged prior to approval of final payment). He will also have authority to require special inspection or testing of the Work as provided in paragraph 13.7, whether or not the Work is fabricated, installed or completed.

Shop Drawings, Change Orders and Payments:

9.5. In connection with ENGINEER's responsibility for Shop Drawings and samples, see paragraphs 6.23 through 6.28 inclusive.

9.6. In connection with ENGINEER's responsibility for Change Orders, see Articles 10, 11 and 12.

9.7. In connection with ENGINEER's responsibilities in respect of Applications for Payment, etc., see Article 14.

Resident Project Representative:

9.8. If OWNER and ENGINEER agree, ENGINEER will furnish a Resident Project Representative and assistants to assist ENGINEER in carrying out his responsibilities at the site. The duties, responsibilities and limitations of authority of any such Resident Project Representative and assistants shall be as set forth in an exhibit to be incorporated in the Contract Documents.

Decisions on Disagreements:

9.9. ENGINEER will be the interpreter of the requirements of the Contract Documents and the judge of the performance thereunder. In his capacity as interpreter and judge he will exercise his best efforts to insure faithful performance by both OWNER and CONTRACTOR. He will not show partiality to either and will not be liable for the result of any interpretation or decision rendered in good faith. Claims, disputes and other matters relating to the execution and progress of the Work or the interpretation of or performance under the Contract Documents shall be referred to ENGINEER for decision; which he will render in writing within a reasonable time.

9.10. Either OWNER or CONTRACTOR may demand arbitration with respect to any such claim, dispute or other matter that has been referred to ENGINEER, except any which have been waived by the making or acceptance of final payment as provided in paragraph 14.16, such arbitration to be in accordance with Article 16. However, no demand for arbitration of any such claim, dispute or other matter shall be made until the earlier of (a) the date on which ENGINEER has rendered his decision or (b) the tenth day after the parties have pre-

[illegible] ENGINEER as he has not rendered his written decision before that date. No demand for arbitration shall be made later than thirty days after the date on which ENGINEER rendered his written decision in respect of the claim, dispute or other matter as to which arbitration is sought; and the failure to demand arbitration within said thirty days' period shall result in ENGINEER's decision being final and binding upon OWNER and CONTRACTOR. If ENGINEER renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence but shall not supersede the arbitration proceedings, except where the decision is acceptable to the parties concerned.

Limitations on ENGINEER's Responsibilities:

9.11. Neither ENGINEER's authority to act under this Article 9 or elsewhere in the Contract Documents nor any decision made by him in good faith either to exercise or not exercise such authority shall give rise to any duty or responsibility of ENGINEER to CONTRACTOR, any Subcontractor, any manufacturer, fabricator, supplier or distributor, or any of their agents or employees or any other person performing any of the Work.

9.12. ENGINEER will not be responsible for CONTRACTOR's means, methods, techniques, sequences or procedures of construction, or the safety precautions and programs incident thereto, and he will not be responsible for CONTRACTOR's failure to perform the Work in accordance with the Contract Documents.

9.13. ENGINEER will not be responsible for the acts or omissions of CONTRACTOR, or any Subcontractor, or any of his or their agents or employees, or any other persons at the site or otherwise performing any of the Work.

ARTICLE 10—CHANGES IN THE WORK

10.1. Without invalidating the Agreement, OWNER may, at any time or from time to time, order additions, deletions or revisions in the Work; these will be authorized by Change Orders. Upon receipt of a Change Order, CONTRACTOR shall proceed with the Work involved. All such Work shall be executed under the applicable conditions of the Contract Documents. If any Change Order causes an increase or decrease in the Contract Price or an extension or shortening of the Contract Time, an equitable adjustment will be made as provided in Article 11 or Article 12 on the basis of a claim made by either party.

10.2. ENGINEER may authorize minor changes or alterations in the Work not involving extra cost and not inconsistent with the overall intent of the Contract Documents. These may be accomplished by a Field Order. If CONTRACTOR believes that any minor change or alteration authorized by ENGINEER entitles him to an increase in the Contract Price, he may make a claim therefor as provided in Article 11.

10.3. Additional Work performed by CONT without authorization of a Change Order will n him to an increase in the Contract Price or an of the Contract Time, except in the case of an e as provided in paragraph 6.22 and except as in paragraphs 10.2 and 13.7.

10.4. OWNER shall execute appropriate Cha ders prepared by ENGINEER covering change Work to be performed as provided in paragraph Work performed in an emergency as provided i graph 6.22 and any other claim of CONTRA for a change in the Contract Time or the Contrac which is approved by ENGINEER.

10.5. It is CONTRACTOR's responsibility to his Surety of any changes affecting the general sc the Work or change in the Contract Price and the a of the applicable bonds shall be adjusted accord CONTRACTOR shall furnish proof of such adjus to OWNER.

ARTICLE 11—CHANGE OF CONTRACT PRICE

11.1. The Contract Price constitutes the total c pensation payable to CONTRACTOR for performing Work. All duties, responsibilities and obligations assig to or undertaken by CONTRACTOR shall be at his pense without change in the Contract Price.

11.2. The Contract Price may only be changed by Change Order. Any claim for an increase in the Contr Price shall be based on written notice delivered to OWN and ENGINEER within fifteen days of the occurrence the event giving rise to the claim. Notice of the amou of the claim with supporting data shall be delivered with forty-five days of such occurrence unless ENGINEE allows an additional period of time to ascertain accura cost data. All claims for adjustments in the Contrac Price shall be determined by ENGINEER if OWNER and CONTRACTOR cannot otherwise agree on the amount involved. Any change in the Contract Price resulting from any such claim shall be incorporated in a Change Order.

11.3. The value of any Work covered by a Change Order or of any claim for an increase or decrease in the Contract Price shall be determined in one of the following ways:

11.3.1. Where the Work involved is covered by unit prices contained in the Contract Documents, by application of unit prices to the quantities of the items involved.

11.3.2. By mutual acceptance of a lump sum.

11.3.3. On the basis of the Cost of the Work (determined as provided in paragraphs 11.4 and 11.5) plus a Contractor's Fee for overhead and profit (determined as provided in paragraph 11.6).

Cost of the Work:

11.4. The term Cost of the Work means the sum of all costs necessarily incurred and paid by the CONTRACTOR in the proper performance of the Work. Except as otherwise may be agreed to in writing by OWNER, such costs shall be in amounts no higher than those prevailing in the locality of the Project, shall include only the following items and shall not include any of the costs itemized in paragraph 11.5.

11.4.1. Payroll costs for employees in the direct employ of CONTRACTOR in the performance of the Work under schedules of job classifications agreed upon by OWNER and CONTRACTOR. Payroll costs for employees not employed full time on the Work shall be apportioned on the basis of their time spent on the Work. Payroll costs shall include, but not be limited to, salaries and wages plus the cost of fringe benefits which shall include social security contributions, unemployment, excise and payroll taxes, workmen's compensation, health and retirement benefits, bonuses, sick leave, vacation and holiday pay applicable thereto. Such employees shall include superintendents and foremen at the site. The expenses of performing work after regular working hours, on Sunday or legal holidays shall be included in the above to the extent authorized by OWNER.

11.4.2. Cost of all materials and equipment furnished and incorporated in the Work, including costs of transportation and storage thereof, and manufacturers' field services required in connection therewith. All cash discounts shall accrue to CONTRACTOR unless OWNER deposits funds with CONTRACTOR with which to make payments, in which case the cash discounts shall accrue to OWNER. All trade discounts, rebates and refunds, and all returns from sale of surplus materials and equipment shall accrue to OWNER, and CONTRACTOR shall make provisions so that they may be obtained.

11.4.3. Payments made by CONTRACTOR to the Subcontractors for Work performed by Subcontractors. If required by OWNER, CONTRACTOR shall obtain competitive bids from Subcontractors acceptable to him and shall deliver such bids to OWNER who will then determine with the advice of ENGINEER, which bids will be accepted. If a subcontract provides that the Subcontractor is to be paid on the basis of Cost of the Work Plus a Fee, the Cost of the Work shall be determined in accordance with paragraphs 11.4 and 11.5. All subcontracts shall be subject to the other provisions of the Contract Documents insofar as applicable.

11.4.4. Costs of special consultants (including, but not limited to, engineers, architects, testing laboratories, surveyors, lawyers and accountants) employed for services specifically related to the Work.

11.4.5. Supplemental costs including the following:

11.4.5.1. The proportion of necessary transportation, traveling and subsistence expenses of CONTRACTOR's employees incurred in discharge of duties connected with the Work.

11.4.5.2. Cost, including transportation and maintenance, of all materials, supplies, equipment, machinery, appliances, office and temporary facilities at the site and hand tools not owned by the workmen, which are consumed in the performance of the Work, and cost less market value of such items used but not consumed which remain the property of CONTRACTOR.

11.4.5.3. Rentals of all construction equipment and machinery and the parts thereof whether rented from CONTRACTOR or others in accordance with rental agreements approved by OWNER with the advice of ENGINEER, and the costs of transportation, loading, unloading, installation, dismantling and removal thereof—all in accordance with terms of said rental agreements. The rental of any such equipment, machinery or parts shall cease when the use thereof is no longer necessary for the Work.

11.4.5.4. Sales, use or similar taxes related to the Work, and for which CONTRACTOR is liable, imposed by any governmental authority [illegible]

11.4.5.5. Deposits lost for causes other than CONTRACTOR's negligence, royalty payments and fees for permits and licenses.

11.4.5.6. Losses, damages and expenses, not compensated by insurance or otherwise, sustained by CONTRACTOR in connection with the execution of, and to, the Work, provided they have resulted from causes other than the negligence of CONTRACTOR, any Subcontractor [illegible] directly or indirectly employed by any [illegible] whose acts any of them may be [illegible] shall include settlements made with [illegible] sent and approval of OWNER. No [illegible] ages and expenses shall be included [illegible] Work for the purpose of determining [illegible] If, however, any such loss or damage [illegible] struction and CONTRACTOR [illegible] thereof, he shall be paid for [illegible] proportionate to that stated in [illegible]

11.4.5.7. The cost of utilities, [illegible] facilities at the site.

11.4.5.8. Minor expenses such as [illegible] distance telephone calls, telephone [illegible] site, expressage and similar [illegible] connection with the Work.

11.4.5.9. Cost [illegible] surance which OWNER is required [illegible] cordance with paragraph 5.12.

11.5. The term Cost of the Work shall not include any of the following:

11.5.1. Payroll costs and other compensation of CONTRACTOR's officers, executives, principals (of partnership and sole proprietorships), general managers, engineers, architects, estimators, lawyers, auditors, accountants, purchasing and contracting agents, expediters, timekeepers, clerks and other personnel employed by CONTRACTOR whether at the site or in his principal or a branch office for general administration of the Work and not specifically included in the schedule referred to in subparagraph 11.4.1—all of which are to be considered administrative costs covered by the Contractor's Fee.

11.5.2. Expenses of CONTRACTOR's principal and branch offices other than his office at the site.

11.5.3. Any part of CONTRACTOR's capital expenses, including interest on CONTRACTOR's capital employed for the Work and charges against CONTRACTOR for delinquent payments.

11.5.4. Cost of premiums for all bonds and for all insurance policies whether or not CONTRACTOR is required by the Contract Documents to purchase and maintain the same (except as otherwise provided in subparagraph 11.4.5.9).

11.5.5. Costs due to the negligence of CONTRACTOR, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, including but not limited to, the correction of defective work, disposal of materials or equipment wrongly supplied and making good any damage to property.

11.5.6. Other overhead or general expense costs of any kind and the costs of any item not specifically and expressly included in paragraph 11.4.

Contractor's Fee:

11.6. The Contractor's Fee which shall be allowed to CONTRACTOR for his overhead and profit shall be determined as follows:

11.6.1. a mutually acceptable fixed fee; or if none can be agreed upon,

11.6.2. a fee based on the following percentages of the various portions of the Cost of the Work:

11.6.2.1. for costs incurred under paragraphs 11.4.1 and 11.4.2, the Contractor's Fee shall be ten percent.

11.6.2.2. for costs incurred under paragraph 11.4.3, the Contractor's Fee shall be five percent; and if a subcontract is on the basis of Cost of the Work Plus a Fee, the maximum allowable to the Subcontractor as a fee for overhead and profit shall be ten percent, and

11.6.2.3. no fee shall be payable on the basis of costs itemized under paragraphs 11.4.4, 11.4.5 and 11.5.

11.7. The amount of credit to be allowed by CONTRACTOR to OWNER for any such change which results in a net decrease in cost, will be the amount of the actual net decrease. When both additions and credits are involved in any one change, the combined overhead and profit shall be figured on the basis of the net increase, if any.

11.8. Whenever the cost of any Work is to be determined pursuant to paragraphs 11.4. and 11.5, CONTRACTOR will submit in form prescribed by ENGINEER an itemized cost breakdown together with supporting data.

Cash Allowances:

11.9. It is understood that CONTRACTOR has included in the Contract Price all allowances so named in the Contract Documents and shall cause the Work so covered to be done by such materialmen, suppliers or Subcontractors and for such sums within the limit of the allowances as ENGINEER may approve. Upon final payment, the Contract Price shall be adjusted as required and an appropriate Change Order issued. CONTRACTOR agrees that the original Contract Price includes such sums as he deems proper for costs and profit on account of cash allowances. No demand for additional cost or profit in connection therewith will be allowed.

ARTICLE 12—CHANGE OF THE CONTRACT TIME

12.1. The Contract Time may only be changed by a Change Order. Any claim for an extension in the Contract Time shall be based on written notice delivered to OWNER and ENGINEER within fifteen days of the occurrence of the event giving rise to the claim. Notice of the extent of the claim with supporting data shall be delivered within forty-five days of such occurrence unless ENGINEER allows an additional period of time to ascertain more accurate data. All claims for adjustment in the Contract Time shall be determined by ENGINEER if OWNER and CONTRACTOR cannot otherwise agree. Any change in the Contract Time resulting from any such claim shall be incorporated in a Change Order.

12.2. The Contract Time will be extended in an amount equal to time lost due to delays beyond the control of CONTRACTOR if he makes a claim therefor as provided in paragraph 12.1. Such delays shall include, but not be restricted to, acts or neglect by any separate contractor employed by OWNER, fires, floods, labor disputes, epidemics, abnormal weather conditions, or acts of God.

12.3. All time limits stated in the Contract Documents are of the essence of the Agreement. The provisions of this Article 12 shall not exclude recovery for damages (including compensation for additional professional services) for delay by either party.

ARTICLE 13—WARRANTY AND GUARANTEE, TESTS AND INSPECTIONS; CORRECTION, REMOVAL OR ACCEPTANCE OF DEFECTIVE WORK

Warranty and Guarantee:

13.1. CONTRACTOR warrants and guarantees to OWNER and ENGINEER that all materials and equipment will be new unless otherwise specified and that all Work will be of good quality and free from faults or defects and in accordance with the requirements of the Contract Documents and of any inspections, tests or approvals referred to in paragraph 13.2. All unsatisfactory Work, all faulty or defective Work, and all Work not conforming to the requirements of the Contract Documents at the time of acceptance thereof or of such inspections, tests or approvals, shall be considered defective. Prompt notice of all defects shall be given to CONTRACTOR. All defective Work, whether or not in place, may be rejected, corrected or accepted as provided in this Article 13.

Tests and Inspections:

13.2. If the Contract Documents, laws, ordinances, rules, regulations or orders of any public authority having jurisdiction require any Work to specifically be inspected, tested, or approved by some public body, CONTRACTOR shall assume full responsibility therefor, pay all costs in connection therewith and furnish ENGINEER the required certificates of inspection, testing or approval. All other inspections, tests and approvals required by the Contract Documents shall be performed by organizations acceptable to OWNER and CONTRACTOR and the costs thereof shall be borne by OWNER unless otherwise specified.

13.3. CONTRACTOR shall give ENGINEER timely notice of readiness of the Work for all inspections, tests or approvals. If any such Work required so to be inspected, tested or approved is covered without written approval of ENGINEER, it must, if requested by ENGINEER, be uncovered for observation, and such uncovering shall be at CONTRACTOR's expense unless CONTRACTOR has given ENGINEER timely notice of his intention to cover such Work and ENGINEER has not acted with reasonable promptness in response to such notice.

13.4. Neither observations by ENGINEER nor inspections, tests or approvals by persons other than CONTRACTOR shall relieve CONTRACTOR from his obligations to perform the Work in accordance with the requirements of the Contract Documents.

Access to Work:

13.5. ENGINEER and his representatives and other representatives of OWNER will at reasonable times have access to the Work. CONTRACTOR shall provide proper and safe facilities for such access and observation of the Work and also for any inspection or testing thereof by others.

Uncovering Work:

13.6. If any Work is covered contrary to the written request of ENGINEER, it must, if requested by ENGINEER, be uncovered for his observation and replaced at CONTRACTOR's expense.

13.7. If any Work has been covered which ENGINEER has not specifically requested to observe prior to its being covered, or if ENGINEER considers it necessary or advisable that covered Work be inspected or tested by others, CONTRACTOR, at ENGINEER's request, shall uncover, expose or otherwise make available for observation, inspection or testing as ENGINEER may require, that portion of the Work in question, furnishing all necessary labor, material and equipment. If it is found that such Work is defective, CONTRACTOR shall bear all the expenses of such uncovering, exposure, observation, inspection and testing and of satisfactory reconstruction, including compensation for additional professional services, and an appropriate deductive Change Order shall be issued. If, however, such Work is not found to be defective, CONTRACTOR shall be allowed an increase in the Contract Price or an extension of the Contract Time, or both, directly attributable to such uncovering, exposure, observation, inspection, testing and reconstruction if he makes a claim therefor as provided in Articles 11 and 12.

Owner May Stop the Work:

13.8. If the Work is defective, or CONTRACTOR fails to supply sufficient skilled workmen or suitable materials or equipment, or if CONTRACTOR fails to make prompt payments to Subcontractors or for labor, materials or equipment, OWNER may order CONTRACTOR to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of OWNER to stop the Work shall not give rise to any duty on the part of OWNER to exercise this right for the benefit of CONTRACTOR or any other party.

Correction or Removal of Defective Work:

13.9. If required by ENGINEER prior to approval of final payment, CONTRACTOR shall promptly, without cost to OWNER and as specified by ENGINEER, either correct any defective Work, whether or not fabricated, installed or completed, or, if the Work has been rejected by ENGINEER, remove it from the site and replace it with nondefective Work. If CONTRACTOR does not correct such defective Work or remove and replace such rejected Work within a reasonable time, all as specified in a written notice from ENGINEER, OWNER may have the deficiency corrected or the rejected Work removed and replaced. All direct or indirect costs of such correction or removal and replacement, including compensation for additional professional services, shall be paid by CONTRACTOR, and an appropriate deductive Change Order shall be issued. CONTRACTOR shall also bear the expenses of making good all Work of others destroyed or damaged by his correction, removal or replacement of his defective Work.

One Year Correction Period:

13.10. If after the approval of final payment and prior to the expiration of one year after the date of Substantial Completion or such longer period of time as may be prescribed by law or by the terms of any applicable special guarantee required by the Contract Documents, any Work is found to be defective, CONTRACTOR shall promptly, without cost to OWNER and in accordance with OWNER's written instructions, either correct such defective Work, or, if it has been rejected by OWNER, remove it from the site and replace it with nondefective Work. If CONTRACTOR does not promptly comply with the terms of such instructions, OWNER may have the defective Work corrected or the rejected Work removed and replaced, and all direct and indirect costs of such removal and replacement, including compensation for additional professional services, shall be paid by CONTRACTOR.

Acceptance of Defective Work:

13.11. If, instead of requiring correction or removal and replacement of defective Work, OWNER (and, prior to approval of final payment, also ENGINEER) prefers to accept it, he may do so. In such case, if acceptance occurs prior to approval of final payment, a Change Order shall be issued incorporating the necessary revisions in the Contract Documents, including appropriate reduction in the Contract Price; or, if the acceptance occurs after approval of final payment, an appropriate amount shall be paid by CONTRACTOR to OWNER.

Neglected Work by Contractor:

13.12. If CONTRACTOR should fail to prosecute the Work in accordance with the Contract Documents, including any requirements of the progress schedule, OWNER, after seven days' written notice to CONTRACTOR may, without prejudice to any other remedy he may have, make good such deficiencies and the cost thereof (including compensation for additional professional services) shall be charged against CONTRACTOR if ENGINEER approves such action, in which case a Change Order shall be issued incorporating the necessary revisions in the Contract Documents including an appropriate reduction in the Contract Price. If the payments then or thereafter due CONTRACTOR are not sufficient to cover such amount, CONTRACTOR shall pay the difference to OWNER.

ARTICLE 14—PAYMENTS AND COMPLETION

Schedules:

14.1. At least ten days prior to submitting the first Application for a progress payment, CONTRACTOR shall submit a progress schedule, a final schedule of Shop Drawing submissions and a schedule of values of the Work. These schedules shall be satisfactory in form and substance to ENGINEER. The schedule of values shall include quantities and unit prices aggregating the Contract Price, and shall subdivide the Work into component parts in sufficient detail to serve as the basis for progress payments during construction. Upon approval of the schedules of values by ENGINEER, it shall be incorporated into the form of Application for Payment furnished by ENGINEER.

Application for Progress Payment:

14.2. At least ten days before each progress payment falls due (but not more often than once a month), CONTRACTOR shall submit to ENGINEER for review an Application for Payment filled out and signed by CONTRACTOR covering the Work completed as of the date of the Application and accompanied by such data and schedules as ENGINEER may reasonably require. If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at the site or at another location agreed to in writing, the Application for Payment shall also be accompanied by such data, satisfactory to OWNER, as will establish OWNER's title to the material and equipment and protect his interest therein, including applicable insurance. Each subsequent Application for Payment shall include an affidavit of CONTRACTOR stating that all previous progress payments received on account of the Work have been applied to discharge in full all of CONTRACTOR's obligations reflected in prior Applications for Payment.

Contractor's Warranty of Title:

14.3. CONTRACTOR warrants and guarantees that title to all Work, materials and equipment covered by any Application for Payment, whether incorporated in the Project or not, will pass to OWNER at the time of payment free and clear of all liens, claims, security interests and encumbrances (hereafter in these General Conditions referred to as "Liens").

Approval of Payments:

14.4. ENGINEER will, within ten days after receipt of each Application for Payment, either indicate in writing his approval of payment and present the Application to OWNER, or return the Application to CONTRACTOR indicating in writing his reasons for refusing to approve payment. In the latter case, CONTRACTOR may make the necessary corrections and resubmit the Application. OWNER shall, within ten days of presentation to him of an approved Application for Payment, pay CONTRACTOR the amount approved by ENGINEER.

14.5. ENGINEER's approval of any payment requested in an Application for Payment will constitute a representation by him to OWNER, based on ENGINEER's on-site observations of the Work in progress as an experienced and qualified design professional and on his review of the Application for Payment and the accompanying data and schedules that the Work has progressed to the point indicated; that, to the best of his knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents (subject to an evaluation of the Work as a functioning Project upon Substantial Completion, to the results of any subsequent tests called for in the Contract Documents and any qualifications stated in his approval); and that CONTRACTOR is entitled to payment of the amount approved. However, by approving any such payment ENGINEER will not thereby be deemed to have represented that he made exhaustive or continuous on-site inspections to check the quality or the quantity of the Work, or that he has reviewed the means, methods, techniques, sequences, and procedures of construction, or that he has made any examination to ascertain how or for what purpose CONTRACTOR has used the moneys paid or to be paid to him on account of the Contract Price, or that title to any Work, materials or equipment has passed to OWNER free and clear of any Liens.

14.6. ENGINEER's approval of final payment will constitute an additional representation by him to OWNER that the conditions precedent to CONTRACTOR's being entitled to final payment as set forth in paragraph 14.13 have been fulfilled.

14.7. ENGINEER may refuse to approve the whole or any part of any payment if, in his opinion, it would be incorrect to make such representations to OWNER. He may also refuse to approve any such payment, or, because of subsequently discovered evidence or the results of subsequent inspections or tests, nullify any such payment previously approved, to such extent as may be necessary in his opinion to protect OWNER from loss because:

14.7.1. the Work is defective, or completed Work has been damaged requiring correction or replacement,

14.7.2. claims or Liens have been filed or there is reasonable cause to believe such may be filed,

14.7.3. the Contract Price has been reduced because of Modifications,

14.7.4. OWNER has been required to correct defective Work or complete the Work in accordance with paragraph 13.11, or

14.7.5. of unsatisfactory prosecution of the Work, including failure to furnish acceptable submittals or to clean up.

Substantial Completion:

14.8. Prior to final payment, CONTRACTOR may, in writing to OWNER and ENGINEER, certify that the entire Project is substantially complete and request that ENGINEER issue a certificate of Substantial Completion. Within a reasonable time thereafter, OWNER, CONTRACTOR and ENGINEER shall make an inspection of the Project to determine the status of completion. If ENGINEER does not consider the Project substantially complete, he will notify CONTRACTOR in writing giving his reasons therefor. If ENGINEER considers the Project substantially complete, he will prepare and deliver to OWNER a tentative certificate of Substantial Completion which shall fix the date of Substantial Completion and the responsibilities between OWNER and CONTRACTOR for maintenance, heat and utilities. There shall be attached to the certificate a tentative list of items to be completed or corrected before final payment, and the certificate shall fix the time within which such items shall be completed or corrected, said time to be within the Contract Time. OWNER shall have seven days after receipt of the tentative certificate during which he may make written objection to ENGINEER as to any provisions of the certificate or attached list. If, after considering such objections, ENGINEER concludes that the Project is not substantially complete, he will within fourteen days after submission of the tentative certificate to OWNER notify CONTRACTOR in writing, stating his reasons therefor. If, after consideration of OWNER's objections, ENGINEER considers the PROJECT substantially complete, he will within said fourteen days execute and deliver to OWNER and CONTRACTOR a definitive certificate of Substantial Completion (with a revised tentative list of items to be completed or corrected) reflecting such changes from the tentative certificate as he believes justified after consideration of any objections from OWNER.

14.9. OWNER shall have the right to exclude CONTRACTOR from the Project after the date of Substantial Completion, but OWNER shall allow CONTRACTOR reasonable access to complete or correct items on the tentative list.

Partial Utilization:

14.10. Prior to final payment, OWNER may request CONTRACTOR in writing to permit him to use a specified part of the Project which he believes he may use without significant interference with construction of the other parts of the Project. If CONTRACTOR agrees, he will certify to OWNER and ENGINEER that said part of the Project is substantially complete and request ENGINEER to issue a certificate of Substantial Completion for that part of the Project. Within a reasonable time thereafter OWNER, CONTRACTOR and ENGINEER shall make an inspection of that part of the Project to determine its status of completion. If ENGINEER does not consider that it is substantially complete, he will notify OWNER and CONTRACTOR in writing giving his reasons therefor. If ENGINEER considers that part of the Project to be substantially complete, he will execute and deliver to OWNER and CONTRACTOR a certificate to that effect, fixing the date of Substantial Completion as to that part of the Project, attaching thereto a tentative list of items to be completed or corrected before final payment and fixing the responsibility between OWNER and CONTRACTOR for maintenance, heat and utilities as to that part of the Project. OWNER shall have the right to exclude CONTRACTOR from any part of the Project which ENGINEER has so certified to be substantially complete, but OWNER shall allow CONTRACTOR reasonable access to complete or correct items on the tentative list.

Final Inspection:

14.11. Upon written notice from CONTRACTOR that the Project is complete, ENGINEER will make a final inspection with OWNER and CONTRACTOR and will notify CONTRACTOR in writing of all particulars in which this inspection reveals that the Work is incomplete or defective CONTRACTOR shall immediately take such measures as are necessary to remedy such deficiencies.

Final Application for Payment

14.12. After CONTRACTOR has completed all such corrections to the satisfaction of ENGINEER and delivered all maintenance and operating instructions, schedules, guarantees, Bonds, certificates of inspection and other documents—all as required by the Contract Documents, he may make application for final payment following the procedure for progress payments. The final Application for Payment shall be accompanied by such data and schedules as ENGINEER may reasonably require, together with complete and legally effective releases or waivers (satisfactory to OWNER) of all Liens arising out of the Contract Documents and the labor and services performed and the material and equipment furnished thereunder. In lieu thereof and as approved by OWNER, CONTRACTOR may furnish receipts or releases in full, an affidavit of CONTRACTOR that the releases and receipts include all labor, services, material and equipment for which a Lien could be filed, and that all payrolls, material and equipment bills, and other indebtedness connected with the Work for which OWNER or his property might in any way be responsible, have been paid or otherwise satisfied, and consent of the Surety, if any, to final payment. If any Subcontractor, materialman, fabricator or supplier fails to furnish a release or receipt in full, CONTRACTOR may furnish a Bond or other collateral satisfactory to OWNER to indemnify him against any Lien.

Approval of Final Payment

14.13. If, on the basis of his observation and review of the Work during construction, his final inspection and his review of the final Application for Payment—all as required by the Contract Documents, ENGINEER is satisfied that the Work has been completed and CONTRACTOR has fulfilled all of his obligations under the Contract Documents, he will, within ten days after receipt of the final Application for Payment, indicate in writing his approval of payment and present the Application to OWNER for payment. Thereupon ENGINEER will give written notice to OWNER and CONTRACTOR that the Work is acceptable subject to the provisions of paragraph 14.16. Otherwise, he will return the Application to CONTRACTOR, indicating in writing his reasons for refusing to approve final payment, in which case CONTRACTOR shall make the necessary corrections and resubmit the Application. OWNER shall, within ten days of presentation to him of an approved final Application for Payment, pay CONTRACTOR the amount approved by ENGINEER.

14.14. If after Substantial Completion of the Work final completion thereof is materially delayed through no fault of CONTRACTOR, and ENGINEER so confirms, OWNER shall, upon certification by ENGINEER, and without terminating the Agreement, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than the retainage stipulated in the Agreement, and if Bonds have been furnished as required in paragraph 5.1, the written consent of the Surety to the payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the CONTRACTOR to the ENGINEER prior to certification of such payment. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

Contractor's Continuing Obligation:

14.15. CONTRACTOR's obligation to perform the Work and complete the Project in accordance with the Contract Documents shall be absolute. Neither approval of any progress or final payment by ENGINEER, nor the issuance of a certificate of Substantial Completion, nor any payment by OWNER to CONTRACTOR under the Contract Documents, nor any use or occupancy of the Project or any part thereof by OWNER, nor any act of acceptance by OWNER nor any failure to do so, nor any correction of defective work by OWNER shall constitute an acceptance of Work not in accordance with the Contract Documents.

Waiver of Claims:

14.16. The making and acceptance of final payment shall constitute:

14.16.1. a waiver of all claims by OWNER against CONTRACTOR other than those arising from unsettled Liens, from defective work appearing after final inspection pursuant to paragraph 14.11 or from failure to comply with the requirements of the Contract Documents or the terms of any special guarantees specified therein, and

14.16.2. a waiver of all claims by CONTRACTOR against OWNER other than those previously made in writing and still unsettled.

ARTICLE 15—SUSPENSION OF WORK AND TERMINATION

Owner May Suspend Work:

15.1. OWNER may, at any time and without cause, suspend the Work or any portion thereof for a period of not more than ninety days by notice in writing to CONTRACTOR and ENGINEER which shall fix the date on which Work shall be resumed. CONTRACTOR shall resume the Work on the date so fixed. CONTRACTOR will be allowed an increase in the Contract Price or an extension of the Contract Time, or both, directly attributable to any suspension if he makes a claim therefor as provided in Articles 11 and 12.

Owner May Terminate:

15.2. If CONTRACTOR is adjudged a bankrupt or insolvent, or if he makes a general assignment for the benefit of his creditors, or if a trustee or receiver is appointed for CONTRACTOR or for any of his property, or if he files a petition to take advantage of any debtor's act, or to reorganize under the bankruptcy or similar laws, or if he repeatedly fails to supply sufficient skilled workmen or suitable materials or equipment, or if he repeatedly fails to make prompt payments to Subcontractors or for labor, materials or equipment or if he disregards laws, ordinances, rules, regulations or orders of any public body having jurisdiction, or if he disregards the authority of ENGINEER, or if he otherwise violates any provision of the Contract Documents, then OWNER may, without prejudice to any other right or remedy and after giving CONTRACTOR and his Surety seven days' written notice, terminate the services of CONTRACTOR and take possession of the Project and of all materials, equipment, tools, construction equipment and machinery thereon owned by CONTRACTOR, and finish the Work by whatever method he may deem expedient. In such case CONTRACTOR shall not be entitled to receive any further payment until the Work is finished. If the unpaid balance of the Contract Price exceeds the direct and indirect costs of completing the Project, including compensation for additional professional services, such excess shall be paid to CONTRACTOR. If such costs exceed such unpaid balance, CONTRACTOR shall pay the difference to OWNER. Such costs incurred by OWNER shall be determined by ENGINEER and incorporated in a Change Order.

15.3. Where CONTRACTOR'S services have been so terminated by OWNER, said termination shall not affect any rights of OWNER against CONTRACTOR then existing or which may thereafter accrue. Any retention or payment of moneys by OWNER due CONTRACTOR will not release CONTRACTOR from liability.

15.4. Upon seven days' written notice to CONTRACTOR and ENGINEER, OWNER may, without cause and without prejudice to any other right or remedy, elect to abandon the Project and terminate the Agreement. In such case CONTRACTOR shall be paid for all Work executed and any expense sustained plus a reasonable profit.

Contractor May Stop Work or Terminate:

15.5. If, through no act or fault of CONTRACTOR, the Work is suspended for a period of more than ninety days by OWNER or under an order of court or other public authority, or ENGINEER fails to act on any Application for Payment within thirty days after it is submitted, or OWNER fails to pay CONTRACTOR any sum approved by ENGINEER or awarded by arbitrators within thirty days of its approval and presentation, then CONTRACTOR may, upon seven days' written notice to OWNER and ENGINEER, terminate the Agreement and recover from OWNER payment for all Work executed and any expense sustained plus a reasonable profit. In addition and in lieu of terminating the Agreement, if ENGINEER has failed to act on an Application for Payment or OWNER has failed to make any payment as aforesaid, CONTRACTOR may upon seven days' notice to OWNER and ENGINEER stop the Work until he has been paid all amounts then due.

ARTICLE 16—ARBITRATION

16.1. All claims, disputes and other matters in question arising out of, or relating to, this Agreement or the breach thereof except for claims which have been waived by the making or acceptance of final payment as provided by paragraph 14.16, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining. This agreement so to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in any court having jurisdiction thereof.

16.2. Notice of the demand for arbitration shall be filed in writing with the other party to the Agreement and with the American Arbitration Association, and a copy shall be filed with ENGINEER. The demand for arbitration shall be made within the thirty-day period specified in paragraph 9.10 where applicable, and in all other cases within a reasonable time after the claim, dispute or other matter in question has arisen, and in no event shall it be made after institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

16.3. CONTRACTOR will carry on the Work and maintain the progress schedule during any arbitration proceedings, unless otherwise agreed by him and OWNER in writing.

ARTICLE 17—MISCELLANEOUS

Giving Notice:

17.1. Whenever any provision of the Contract Documents requires the giving of written notice it shall be deemed to have been validly given if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or if delivered at or sent by registered or certified mail, postage prepaid, to the last business address known to him who gives the notice.

Computation of Time:

17.2. When any period of time is referred to in the Contract Documents by days, it shall be computed to exclude the first and include the last day of such period. If the last day of any such period falls on a Saturday or Sunday or on a day made a legal holiday by the law of the applicable jurisdiction, such day shall be omitted from the computation.

General:

17.3. All moneys not paid when due hereunder shall bear interest at the maximum rate allowed by law at the place of the Project.

17.4. All Specifications, Drawings and copies thereof furnished by ENGINEER shall remain his property. They shall not be used on another Project, and, with the exception of those sets which have been signed in connection with the execution of the Agreement, shall be returned to him on request upon completion of the Project.

17.5. The duties and obligations imposed by these General Conditions and the rights and remedies available hereunder, and, in particular but without limitation, the warranties, guarantees and obligations imposed upon CONTRACTOR by paragraphs 6.30, 13.1, 13.10 and 14.3 and the rights and remedies available to OWNER and ENGINEER thereunder, shall be in addition to, and shall not be construed in any way as a limitation of, any rights and remedies available to them which are otherwise imposed or available by law, by special guarantee or by other provisions of the Contract Documents.

17.6. Should OWNER or CONTRACTOR suffer injury or damage to his person or property because of any error, omission or act of the other or of any of his employees or agents or others for whose acts he is legally liable, claim shall be made in writing to the other party within a reasonable time of the first observance of such injury or damage.

17.7. The Contract Documents shall be governed by the law of the place of the Project.

◆

Memorandum

TO : Mr. Joe Sam Owen

DATE: May 6, 1980
Effective May 1, 19

FROM : Agnes Tynes, Deputy Clerk

SUBJECT: Consolidation of Cases

Civil Action Nos. S80-0276 and S80-0359 have been consolidated and both have been assigned to Judge Dixon.

All pleadings should have an extra copy attached to be filed in both cases.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

UNITED STATES GOVERNMENT

Memorandum

TO : Mr. James K. Farrell

DATE: May 6, 1980
Effective May 1, 1980

FROM : Agnes Tynes, Deputy Clerk

SUBJECT: Consolidation of Cases

Civil Action Nos. S80-0276 and S80-0359 have been consolidated and both have been assigned to Judge Dixon.

All pleadings should have an extra copy attached to be filed in both cases.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

Memorandum

TO : Mr. Eldon L. Fulton, Jr.

DATE: May 6, 1980
Effective May 1, 1980

FROM : Agnes Tynes, Deputy Clerk

SUBJECT: Consolidation of Cases

Civil Action Nos. S80-0276 and S80-0359 have been consolidated and both have been assigned to Judge Dixon.

All pleadings should have an extra copy attached to be filed in both cases.

Buy U [illegible] onds Regularly on the Payroll Savings Plan

Joe Sam Owen
Attorney at Law
P. O. Box 673
1919 23rd Avenue
Gulfport, Mississippi 39501

JOE SAM OWEN
HERMAN F. COX

AREA CODE 601
868-2521
868-2522

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 9 1980
HARVEY G. HENDERSON, CLERK
BY DEPUTY

May 8, 1980

Honorable James K. Carroll
Gelpi, Sullivan, Carroll & Laborde
Attorneys at Law
934 One Shell Square
New Orleans, Louisiana 70139

Re: Jack N. Seymour, Jr., Plaintiff
vs. L & A Contracting Company, et al;
Civil Action No. S80-0274(N)
Consolidated with: In the Matter of
L & A Contracting Company, et al;
Civil Action No. S80-0359(N)

Dear Jim:

Please be advised that Mr. Bobby O'Barr of the law firm of O'Barr & Hurlbert in Biloxi, Mississippi will be participating with my firm in the representation of Mr. Jack N. Seymour, Jr. I would request that conformed copies of any letters or pleadings submitted to me in the above cause be also submitted to Mr. O'Barr.

By copy of this letter, I am requesting the Clerk to file a copy of this letter among the papers in the above cause to reflect Mr. O'Barr's participation in this case.

With kindest regards, I remain

Sincerely yours,

JOE SAM OWEN

JSO:cc
xc Honorable Eldon L. Bolton, Jr.
xc Honorable George E. Morse
xc Honorable Paul J. Delcambre, Jr.
xc Honorable Bobby O'Barr
xc Mrs. Verta Lee Swetman ✓

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 1 2 1980
HARVEY G. HENDERSON, CLERK
BY _______ DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR. PLAINTIFF

VERSUS CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC. DEFENDANTS

CONSOLIDATED WITH:

IN THE MATTER OF:

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CMS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY PETITIONERS

CIVIL ACTION NO. S80-0359(N)

BROWN ENGINEERS, INC. CLAIMANT

REPLY TO THE AFFIRMATIVE DEFENSES SET FORTH IN THE ANSWER OF W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD.

Comes now the Plaintiff, Jack N. Seymour, Jr., and files this his response to the Affirmative Defenses set forth in the Answer of W. R. Fairchild Construction Company, Ltd. and in responding says as follows:

FIRST DEFENSE

The Plaintiff denies the allegations set forth in the First Affirmative Defense.

SECOND DEFENSE

The Plaintiff denies the allegations set forth in the Second Affirmative Defense.

THIRD DEFENSE

The Plaintiff denies the allegations set forth in the Third Affirmative Defense.

Respectfully submitted,

JACK N. SEYMOUR, JR., Plaintiff

By: ______________________
JOE SAM OWEN, Attorney for Plaintiff
1919 23rd Ave.; P. O. Box 673
Gulfport, Mississippi 39501
(601) 868-2821

CERTIFICATE OF SERVICE

I, Joe Sam Owen, Attorney for Jack N. Seymour, Jr., do hereby certify that I have this day forwarded by United States mail, postage prepaid, a true and correct copy of the above and foregoing Reply to the Affirmative Defenses Set Forth in the Answer of W. R. Fairchild Construction Company, Ltd. to the Honorable James K. Carroll, Gelpi, Sullivan, Carroll & Laborde, at his usual mailing address of 934 One Shell Square, New Orleans, Louisiana 70139, and the Honorable Eldon L. Bolton, Jr., at his usual mailing address of Security Savings Building, Gulfport, Mississippi 39501, Attorneys for L & A Contracting Company, Gulf Coast Pre-Stress Company, Ray Sims, Sr. and Moody Brothers of Jacksonville, Inc., and to the Honorable George E. Morse, White & Morse, Attorney for W. R. Fairchild Construction Company, Ltd., at his usual mailing address of Post Office Drawer 100, Gulfport, Mississippi 39501, and to the Honorable Paul J. Delcambre, Jr., Page, Mannino & Peresich, Attorney for Brown Engineers, Inc., at his usual mailing address of Post Office Drawer 289, Biloxi, Mississippi.

This the [illegible]th day of May, 1980.

JOE SAM OWEN

FILED
MAY 1 2 1980
HARVEY G. HENDERSON, CLERK
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR.

PLAINTIFF

VERSUS

CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC.

DEFENDANTS

CONSOLIDATED WITH:

IN THE MATTER OF:

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CNS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY

PETITIONERS

CIVIL ACTION NO. S80-0359(N)

BROWN ENGINEERS, INC.

CLAIMANT

REPLY TO AFFIRMATIVE DEFENSES SET FORTH IN THE ANSWER OF BROWN ENGINEERS, INC.

Comes now the Plaintiff, Jack N. Seymour, Jr., and files this his response to the Affirmative Defenses set forth in the Answer of Brown Engineers, Inc. and in responding says as follows:

FIRST DEFENSE

The Plaintiff denies the allegations of the First Defense.

THIRD DEFENSE

The Plaintiff denies the allegations set forth in the Third Defense.

FOURTH DEFENSE

The Plaintiff denies the allegations set forth in the Fourth Defense.

FIFTH DEFENSE

The Plaintiff denies the allegations set forth in the Fifth Defense.

Respectfully submitted,

JACK N. SEYMOUR, JR., Plaintiff

By:

JOE SAM OWEN, Attorney for Plaintiff
1919 23rd Ave.; P. O. Box 673
Gulfport, Mississippi 39501
(601) 868-2821

CERTIFICATE OF SERVICE

I, Joe Sam Owen, Attorney for Jack N. Seymour, Jr., do hereby certify that I have this day forwarded by United States mail, postage prepaid, a true and correct copy of the above and foregoing Reply to Affirmative Defenses Set Forth in the Answer of Brown Engineers, Inc. to the Honorable James K. Carroll, Gelpi, Sullivan, Carroll & Laborde, at his usual mailing address of 934 One Shell Square, New Orleans, Louisiana 70139, and the Honorable Eldon L. Bolton, Jr., at his usual mailing address of Security Savings Building, Gulfport, Mississippi 39501, Attorneys for L & A Contracting Company, Gulf Coast Pre-Stress Company, Ray Sims, Sr. and Moody Brothers of Jacksonville, Inc.; and to the Honorable George E. Morse, White & Morse, Attorney for W. R. Fairchild Construction Company, Ltd., at his usual mailing address of Post Office Drawer 100, Gulfport, Mississippi 39501; and to the Honorable Paul J. Delcambre, Jr., Page, Mannino & Peresich, Attorney for Brown Engineers, Inc., at his usual mailing address of Post Office Drawer 289, Biloxi, Mississippi.

This the 7th day of May, 1980.

JOE SAM OWEN

SOUTHERN DISTRICT C. I
FILED
MAY 15 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR. — PLAINTIFF

VERSUS — CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC.

DEFENDANTS

CONSOLIDATED WITH:

IN THE MATTER OF:

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE GIS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY

PETITIONERS

CIVIL ACTION NO.: S80-0339(N)

BROWN ENGINEERS, INC. — CLAIMANT

NOTICE OF DEPOSITION

TO:
RAY SIMS
GEORGE LEE
CHARLIE SINDLE

c/o HONORABLE JAMES K. CARROLL
GELPI, SULLIVAN, CARROLL & LABORDE
ATTORNEYS AT LAW
934 ONE SHELL SQUARE
NEW ORLEANS, LOUISIANA 70139

HONORABLE GEORGE E. MORSE
WHITE & MORSE
ATTORNEYS AT LAW
POST OFFICE DRAWER 100
GULFPORT, MISSISSIPPI 39501

HONORABLE PAUL J. DELCAMBRE, JR.
PAGE, MANNINO & PERESICH
ATTORNEYS AT LAW
POST OFFICE DRAWER 289
BILOXI, MISSISSIPPI

NOTICE IS HEREBY GIVEN that the depositions of Charlie Sindle, Ray Sims and George Lee will be taken at 9:30 A.M. on June 5, 1980 at the offices of L & A Contracting Company, Sims Road in Forrest County, Hattiesburg, Mississippi.

You are invited to attend the depositions and examine the witnesses if you so desire.

Respectfully submitted,

JACK N. SEYMOUR, JR., Plaintiff

By: ____________________________
JOE SAM OWEN, Attorney for Plaintiff
1919 23rd Ave.; P. O. Box 673
Gulfport, Mississippi 39501

BOBBY G. O'BARR, Attorney for Plaintiff
O'Barr & Hurlbert
Post Office Box 541
Biloxi, Mississippi 39530

CERTIFICATE OF SERVICE

I, Joe Sam Owen, Attorney for Jack N. Seymour, Jr., do hereby certify that I have this day forwarded by United States mail, postage prepaid, a true and correct copy of the above and foregoing Notice of Deposition to the Honorable James K. Carroll, Celpi, Sullivan, Carroll & Laborde, at his usual mailing address of 934 One Shell Square, New Orleans, Louisiana 70139, and the Honorable Eldon L. Bolton, Jr., at his usual mailing address of Security Savings Building, Gulfport, Mississippi 39501, Attorneys for L & A Contracting Company, Gulf Coast Pre-Stress Company, Ray Sims, Sr. and Moody Brothers of Jacksonville, Inc.; and to the Honorable George E. Morse, White & Morse, Attorney for W. R. Fairchild Construction Company, Ltd., at his usual mailing address of Post Office Drawer 100, Gulfport, Mississippi 39501; and to the Honorable Paul J. Delcambre, Jr., Page, Mannino & Peresich, Attorney for Brown Engineers, Inc., at his usual mailing address of Post Office Drawer 289, Biloxi, Mississippi.

This the [illegible] day of [illegible], 1980.

____
JOE SAM OWEN

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF
MISSISSIPPI

JACK N. SEYMOUR, JR., PLAINTIFF

VS. CIVIL ACTION NO. S80-0274(N)

L&A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR. AND BROWN
ENGINEERS, INC., DEFENDANTS

CONSOLIDATED WITH:

IN THE MATTER OF:

L&A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CMS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY, PETITIONERS

CIVIL ACTION NO. S80-0389(N)

BROWN ENGINEERS, INC., CLAIMANT

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
[illegible] 1980
HARVEY G. HENDERSON, CLERK
BY

RESPONSE TO REQUEST FOR PRODUCTION AND INSPECTION

1. The file of W. R. Fairchild Construction Company, Ltd. (Fairchild) does not contain the original, nor an executed copy, of the contract.

2. A copy of the Joint Venture Agreement has been produced.

3. None.

4. None.

5. None.

6. None.

7. The policy of insurance covering Fairchild and L&A Construction Company joint venture is in the general file of respondent, which is in the custody of Bruce Aultman, Professional Building, Hattiesburg, Mississippi, counsel for Fairchild.

8. None. Fairchild had completed its portion of the contract over a year before the accident occurred.

9. None.

10. None.

12. None.

13. None

14. None.

15. None.

16. None.

17. Fairchild has no control over the barge, tug boat, lumber, cross ties, concrete slabs, or any other matters or things dealing with the demolition of the Old Popps' Ferry Bridge.

Fairchild has a general file which is in the custody of Bruce Aultman, address previously given, which may be examined by counsel for the plaintiff in his office and copies made therein of so much as counsel may desire.

W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD.

BY WHITE & MORSE

BY: ______________________

CERTIFICATE

I, George E. Morse, of counsel for W. R. Fairchild Construction Company, Ltd., in the above styled cause, hereby certify that a true copy of the foregoing Response to Request for Production and Inspection has this day been mailed to Mr. Paul J. Delcambre, P. O. Drawer 289, Biloxi, MS 39533, Mr. Joe Sam Owen, P. O. Box 673, Gulfport, MS 39501, Mr. James K. Carroll, 934 One Shell Square, New Orleans, LA 70139, Mr. Bobby O'Barr, P. O. Box 541, Biloxi, MS 39533, and Mr. Eldon L. Bolton, Jr. P. O. Box 4077, Gulfport, MS 39501.

This 5th day of June, 1990.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF
MISSISSIPPI

JACK N. SEYMOUR, JR., PLAINTIFF

VS. CIVIL ACTION NO. S80-0274(N)

L&A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR. AND BROWN
ENGINEERS, INC., DEFENDANTS

CONSOLIDATED WITH:

IN THE MATTER OF:

L&A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CMS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY, PETITIONERS

FILED
1980
CLERK
BY DEPUTY

CIVIL ACTION NO. S80-0358(N)

BROWN ENGINEERS, INC., CLAIMANT

RESPONSE TO REQUEST FOR PRODUCTION AND INSPECTION

1. The file of W. R. Fairchild Construction Company, Ltd. (Fairchild) does not contain the original, nor an executed copy, of the contract.

2. A copy of the Joint Venture Agreement has been produced.

3. None.

4. None.

5. None.

6. None.

7. The policy of insurance covering Fairchild and L&A Construction Company joint venture is in the general file of respondent, which is in the custody of Bruce Aultman, Professional Building, Hattiesburg, Mississippi, counsel for Fairchild.

8. None. Fairchild had completed its portion of the contract over a year before the accident occurred.

9. None.

10. None.

11. None.

12. None.

13. None

14. None.

15. None.

16. None.

17. Fairchild has no control over the barge, tug boat, lumber, cross ties, concrete slabs, or any other matters or things dealing with the demolition of the Old Popps' Ferry Bridge.

Fairchild has a general file which is in the custody of Bruce Aultman, address previously given, which may be examined by counsel for the plaintiff in his office and copies made therein of so much as counsel may desire.

W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD.

BY WHITE & MORSE

BY: ______________________

CERTIFICATE

I, George E. Morse, of counsel for W. R. Fairchild Construction Company, Ltd., in the above styled cause, hereby certify that a true copy of the foregoing Response to Request for Production and Inspection has this day been mailed to Mr. Paul J. Delcambre, P. O. Drawer 289, Biloxi, MS 39533, Mr. Joe Sam Owen, P. O. Box 673, Gulfport, MS 39501, Mr. James K. Carroll, 934 One Shell Square, New Orleans, LA 70130, Mr. Bobby O'Barr, P. O. Box 541, Biloxi, MS 39533, and Mr. Eldon L. Bolton, Jr. P. O. Box 4077, Gulfport, MS 39501.

This 5th day of June, 1980.

____

This document has important legal consequences; consultation with an attorney is encouraged with respect to its completion or modification.

STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR

ON THE BASIS OF A STIPULATED SUM

THIS AGREEMENT made as of the 17th day of November in the year 1976 by and between

HARRISON COUNTY DEVELOPMENT COMMISSION
P. O. BOX 569, GULFPORT, MISSISSIPPI 39501

(hereinafter called OWNER) and

L & A CONTRACTING COMPANY and W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD.
A JOINT VENTURE, P. O. BOX 1828, HATTIESBURG, MISSISSIPPI 39401

(hereinafter called CONTRACTOR)

WITNESSETH THAT OWNER and CONTRACTOR in consideration of the mutual covenants hereinafter set forth, agree as follows:

Article 1. WORK. The CONTRACTORS shall perform all Work as specified or indicated in the Contract Documents for the completion of the Project generally described as follows:

CONSTRUCTION OF POPPS FERRY BRIDGE PROJECT ACROSS THE BACK BAY OF BILOXI, BILOXI, MISSISSIPPI.

Article 2. ENGINEER. The Project has been designed by

BROWN ENGINEERS, INC. (formerly Brown & Berryhill, Inc.)
P. O. BOX 1118, GULFPORT, MISSISSIPPI 39501
and
MAXWELL T. HUFF, CONSULTING ENGINEER
455 WOODLAND HILLS BUILDING, 3000 OLD CANTON ROAD
JACKSON, MISSISSIPPI

who will act as ENGINEER in connection with completion of the Project in accordance with the Contract Documents.

Article 3. CONTRACT TIME. The Work will be completed within Eight Hundred (800) days after the date when the Contract Time commences to run as provided in paragraph 2.5 of the General Conditions.

NSPE 1910-8-A-1 (1974 Edition)
Reprinted 12-74 10M

© 1974, National Society of Professional Engineers

"This document has been approved by the American Consulting Engineers Council, and recommended for use by its members."

Exhibit "A"

Article 4. CONTRACT PRICE. OWNER shall pay CONTRACTOR for performance of the Work in accordan with the Contract Documents in current funds as follows:

(here insert a lump sum, unit prices or both, attaching schedule if necessary)
(use separate form for Cost-Plus Contracts)

Five Million Two Hundred Twenty-Seven Thousand Six Hundred Fifty-Two and 87/100 Dollars ($5,227,652.87) in accordance with the CONTRACTORS unit price proposal dated September 2, 1976.

Article 5. APPLICATIONS FOR PAYMENT. CONTRACTOR shall submit Applications for Payment in accordance with Article 14 of the General Conditions. Applications for Payment will be reviewed by ENGINEER as provid in the General Conditions.

Article 6. PROGRESS AND FINAL PAYMENTS. OWNER shall make progress payments on account of the Contract Price on the basis of CONTRACTOR's Applications for Payment as approved by ENGINEER, on or about th Tenth (10th) day of each month during construction as provided below. All progress payments will be on the basis of th progress of the Work measured by the schedule of values provided for in paragraph 14.1 of the General Conditions.

6.1. Prior to Substantial Completion progress payments will be in an amount equal to:

Ninety (90)% of the Work completed, and

Ninety (90)% of material and equipment not incorporated in the Work but delivered and suitably stored, less in each case the aggregate of payments previously made.

6.2. Upon Substantial Completion, OWNER shall pay an amount sufficient to increase total payments to CONTRACTOR to 98% of the Contract Price, less retainages as ENGINEER shall determine in accordance with paragraph 14.7 of the General Conditions.

6.3. Upon final completion of the Work and settlement of all claims, OWNER shall pay the remainder of th Contract Price.

Article 7. CONTRACT DOCUMENTS. The Contract Documents which comprise the contract between OWNE and CONTRACTOR are attached hereto and made a part hereof and consist of the following:

7.1. This Agreement (pages 1 to 4, inclusive).

7.2. Exhibits to the Agreement (pages Exhibit A 1 to 1, inclusive).

7.3. CONTRACTOR's Bid and Bonds consisting of 10 pages.

7.4. Notice of Award.

7.5. ~~Instructions~~ Information to Bidders. ~~NSPE Document 1910-12, 1974 edition~~ (pages 1 to 5, inclusive).

7.6. General Conditions, NSPE Document 1910-8, 1974 edition (pages 1 to 25, inclusive).

7.7. Supplementary Conditions (pages 1 to 12 inclusive).

7.8. Specifications ~~(pages ___ to ___, inclusive)~~, as listed on the attached Exhibit A.

7.9. Drawings as listed on the attached exhibit .. A

7.10. Addenda numbers ....1.... to ..3...., inclusive, and

7.11. Any Modifications, including Change Orders, duly delivered after execution of this Agreement.

7.12. NONE

Article 8. MISCELLANEOUS.

8.1. Terms used in this Agreement which are defined in Article 1 of the General Conditions shall have the meanings indicated in the General Conditions.

8.2. Neither OWNER nor CONTRACTOR shall, without the prior written consent of the other, assign or sublet in whole or in part his interest under any of the Contract Documents; and, specifically, CONTRACTOR shall not assign any moneys due or to become due without the prior written consent of OWNER.

8.3. OWNER and CONTRACTOR each binds himself, his partners, successors, assigns and legal representatives to the other party hereto in respect to all covenants, agreements and obligations contained in the Contract Documents

8.4. The Contract Documents constitute the entire agreement between OWNER and CONTRACTOR and may only be altered, amended or repealed by a duly executed written instrument.

Article 9. OTHER PROVISIONS.

NONE

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above writ

OWNER HARRISON COUNTY DEVELOPMENT COMMISSION

By J. F. Balmer Jr.

[CORPORATE SEAL]

Attest

CONTRACTOR L & A CONTRACTING COMPANY

By

[CORPORATE SEAL]

Attest

CONTRACTOR: W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD.

By Rodney Fairchild

~~(CORPORATE SEAL)~~

Witness: Lassie [illegible]

EXHIBIT "A"

SPECIFICATIONS	PAGES
Technical Specifications & Special Provisions Index	1
SP 101 - Definitions and Terms	1
SP 202 - Removal of Existing Bridge across Back Bay	2
SP 203 - Unclassified Excavation	1
SP 323 - In-Grade Preparation	1
SP 604 - Manholes, Inlets and Catch Basins	1
SP 618 - Maintenance of Traffic	2
SP 621 - Engineer's Field Office	2
SP 634 - Highway Illumination System	1
SP 705 - Preformed Neoprene Joint Sealer	3
SP 803 - Bearing Piles	7
SP 804 - Surface Finish	2
SP 810 - Steel Structures	1
SP 814 - Painting Metal Structures	6
SP 821 - Operator's House	10
SP 824 - Concrete Counterweight	3
SP 825 - Counterweight Billets	1
SP 826 - Operating Machinery	7
SP 827 - Electrical Work	28

DRAWINGS	DWG. NO.
Title Sheet	1
Plan Assembly and Estimated Quantities	2
Typical Roadway Sections	3
Plan Profile	4-6
Beam Type Guard Rail Details	7-8
Soil Profile	9
Bridge Layout	10-11
Bridge Structural	12-71
Bridge Mechanical	72-76
Bridge Electrical	77-100
Existing Bridge Plans	101-111

JOINT VENTURE AGREEMENT

THIS AGREEMENT dated December 6, 1976, by and between L & A Construction Company, a Mississippi Corporation, with offices at Hattiesburg, Mississippi, hereinafter referred to as "L & A", and W. R. Fairchild Construction Company, Ltd. a limited partnership, with offices at Hattiesburg/ Mississippi hereinafter referred to as "Fairchild".

WITNESSETH, THAT

WHEREAS, L & A and Fairchild have as joint venturers submitted a bid for the construction of Popps Ferry Bridge Project Across the Back Bay of Biloxi, Mississippi to the Harrison County Development Commission, Harrison County, Mississippi, (The "Work"); and

WHEREAS said bid was the lowest submitted to the Owner, and as a result thereof the Owner has entered into a contract with L & A and Fairchild as Joint Venturers calling for performance of the Work (the "Contract")' and

WHEREAS, L & A and Fairchild mutually desire to establish their respective rights and responsibilities in respect to such contract and the work to be performed thereunder:

NOW THEREFORE,

The parties hereto hereby agree as follows:

1. Performance of work: L & A will perform or be responsible for performance of the following items of work and shall be entitled to receive and retain all payments from the Owner on account of the performance of the said items of work:

ITEM NUMBER	APPROX. QUANTITY	UNIT	ITEM
201-A	Lump Sum	L.S.	Clearing and Grubbing
202-A	Lump Sum	L.S.	Removal of Existing Bridge Superstructure & Substructur
202-B	Lump Sum	L.S.	Removal of Fenders
202-C	Lump Sum	L.S.	Removal of Operator's House
SP-203-A	1,600.0	C/Y	Unclassified Excavation (FM)
203-EX	3,500.0	C/Y	Borrow Excavation (CP)(LVM)
SP-323	Lump Sum	L.S.	Class "D" In-Grade Preparatio
301-1	3,000.0	Ton	8" Plant Mix Bituminous Base Course,Type I
401-3	1,025.0	Ton	3" Hot Bituminous Pavement Surface Course, Type I
603-1	58.0	L/F	24" Reinforced Concrete Pipe, Class III
603-2	1	Each	24" Reinforced Concrete Flared End Section
603-8	190.0	L/F	6" Vit. Clay San. Sewer Pipe, Rubber Gasket Jt.(Std.Str.)
SP-604-C	1	Unit	Sanitary Sewer Manhole
617-A	13	Each	R.O.W. Markers, Type II
SP-618	Lump Sum	L.S.	Maintenance of Traffic
SP-621	Lump Sum	L.S.	Engineers Field Office
606-A	100.0	L/F	Beam Type Guard Rail
619-1	0.382	Mile	Traffic Stripe (Skip White)
619-2	1.509	Mile	Traffic Stripe (Cont. White)
619-5	1.509	Mile	Traffic Stripe (Cont. Yellow)
655-H	6,100.0	S/Y	Standard Ground Preparation Type II
656-A	2.5	Ton	Agricultural Limestone
656-B	0.5	Ton	Combination Fertilizer (13-13-
656-D	0.25	Ton	Ammonium Nitrate
658-A	15.0	Lb.	Seeding (Common [illegible])
658-A	40.0	Lb.	Seeding (Bahia Grass)
659-A	3.0	Ton	Vegetative Material for Mulch Type I

PAY ITEM NUMBER	APPROX. QUANTITY	UNIT	ITEM
659-B	450.0	Gal.	Bituminous Material for Mulch
664	100.0	S/Y	Solid Sodding
804-AA	870.0	C/Y	Class "AA" Bridge Concrete
804-B	5,665.0	C/Y	Class "B" Bridge Concrete
804-T	12,537.0	L/F	50 Ft. Prestressed Concrete B Type III
804-T	2,243.75	L/F	90 Ft. Prestressed Concrete B Type IV
805	1,357,313.0	Lb.	Reinforcement
810-B	Lump Sum	L.S.	Steel Superstructure
812-A	6,062.0	S/F	Steel Grid Floor (5"Open Type)
812-B	1,755.0	S/F	Steel Grid Floor(5" Concrete F
812-B	1,045.0	S/F	Steel Grid Floor (2" Conc.Fill
813-A	7,481.0	L/F	Concrete Railing
813-E	380.0	L/F	Steel Roadway Railing
813-E	4,010.0	L/F	Aluminum Sidewalk Railing
813-E	564.0	L/F	Steel Pipe Railing
SP-821	Lump Sum	L.S.	Operators House
SP-824	460.0	C/Y	Concrete Counterweight
SP-825	357,200.0	Lb.	Counterweight Billets
SP-826	Lump Sum	L.S.	Operating Machinery
SP-827	Lump Sum	L.S.	Electrical Work
820-A	29.000	M.B.M.	Treated Timber

Fairchild will perform or be responsible for performance of the following other items of work called for under the Contract, and shall be entitled to receive and retain all payments from the Owner on account of the performance of said items of work, at the unit prices indicated herein:

PAY ITEM NUMBER	APPROX. QUANTITY	UNIT	ITEM	UNIT P
DRIVE ONLY:				
SP-803-A	9	Each	Test Piles, 18" x 18" Prestressed Concrete	5,500.
SP-803-A	6	Each	Test Piles, 24" x 24" Prestressed Concrete	9,500.
SP-803-A1	4	Each	Redriving Piles, 18" x 18" Prestressed Concrete	500.
SP-803-A1	2	Each	Redriving Piles, 24" x 24" Prestressed Concrete	500.
SP-803-B	4	Each	Loading Test, 18" x 18" Prestressed Concrete	4,600.
SP-803-B	2	Each	Loading Test, 24"x 24" Prestressed Concrete	4,880.
SP-803-B1	4	Each	Reloading Test, 18" x 18" Prestressed Concrete	500.
SP-803-B1	2	Each	Reloading Test, 24" x 24" Prestressed Concrete	500.
803-F	23,695.0	L/F	Prestressed Concrete Piling 18" x 18"	9.
803-F	15,810.0	L/F	Prestressed Concrete Piling 24" x 24"	14.
FURNISH & DRIVE ONLY:				
803-D	19,000.0	L/F	Treated Timber Piling	6.

L & A shall further undertake to comply with all requirement for traffic control and protection of the traveling public. This shall include provision of all signs, markers and other traffic control and safety devices. and signals.

L & A and Fairchild agree, each with the other, to separatel perform its assigned portion of the Contract and all work inciden thereto, using its own materials, labor, supervision, machinery, equipment, tools, supplies,and subcontractors, in strict accordan with the terms and conditions of the contract, including all the general and special conditions, plans, specifications, and other documents forming or by reference made a part thereof, all of whi shall by reference be considered a part of the Contract.

Each is to bear full and complete responsibility for completing its work satisfactorily and on time, all in accordance with said contract or specifications; neither shall be liable to the other or to the Owner for any failure of the other to perform and complete its work; furthermore, each will be responsible for any sales, use or excise taxes relating to its portion of the work to be performed and will carry their own insurance. L & A will pay the premium on the bond required by the owner.

2. Independent Contractor: L & A and Fairchild agree, each with the other, that each will be an independent contractor in the performance of its assigned portion of the work.

3. Liquidated Damages: Any and all liquidated and other damages which may be assessed against the Joint Venture by reason of acts or omissions of one of the parties, including but not limited to acts or omissions resulting in the failure of said party to complete its assigned portion of the Contract within the time set forth in the project schedule, shall be paid by such party; and such party shall indemnify the other against any loss, damage or injury by reason of the assessment of such damages. The payment of such damages shall not release such party from its obligation to fully perform its commitments hereunder and to pay all damages the Joint Venture may sustain by reason of the failure of such party to so perform.

4. Disputes: All disputes and disagreements between the Parties pertaining to this Joint Venture which cannot be resolved by mutual agreement shall be submitted for arbitration to three (3) arbitrators. One arbitrator will be selected by each party to this Agreement hereto and the third arbitrator will be selected by these first two arbitrators picked. The arbitrators shall hear such dispute within 5 days following the date of submission,

and shall render their majority decision within 10 days after the conclusion of such hearing. The arbitrator's decision as to such each and every dispute and disagreement shall be final and binding on all Parties and may be enforceable in any court of record having jurisdiction over one or more of the Parties. The rules of Commercial Arbitration of the American Arbitration Association shall determine the conduct of all arbitration proceedings hereunder.

5. Retainages: In the event the Owner retains any monies due unto the parties hereto, each party shall be entitled to receive its appropriate share and percentage of such retention, and any interest payments accruing thereto, as relates to its performance of work under the Contract.

6. Handling of Funds: The parties to this Joint Venture hereb authorize L & A to endorse checks from the Owner in the name of the venture and make appropriate payments to Fairchild and/or oth thereafter in distribution of the funds received.

7. Insurance and Bonding: L & A and Fairchild shall each provide and maintain compensation for the protection of its employees, as required by law of an employer and as will protect it from loss or damage because of personal injuries including death, to its employees, or any of them; and minimum public liability and property damage insurance as follows:

> Public Liability (including completed operations coverage): Bodily Injury/Property Damage
> $250,000/$500,000
>
> Automobile Public Liability:
> Bodily Injury/ Property Damage
> $250,000/$500,000

L & A and Fairchild each specifically obligates itself to indemnify, protect, and save the other harmless from any and all claims, suits or liabilities for injuries to property, injuries to persons, including death, and from any other claims, suits or liabilities arising out of the performance of its portion of the work, or in any way occasioned by any act or omission of such party or any of its officers, agents, employees, or servants or any subcontractor or other person directly or indirectly engaged by it. All of the insurance policies as herein before provided under this section shall name the Joint Venture as an additional assured thereunder, shall assume and provide for the Venture's defense, and shall serve to indemnify and protect the Joint Venture and save it harmless from all claims, suits or liabilities as set forth herein.

All of said certificates shall set forth on the face thereof contractual coverage as required herein. No amendment or cancellation of any of said policies shall be effective until after thirty (30) days' notice in writing to all parties to this agreement.

L & A and Fairchild further each specifically obligates itself: (a) To indemnify the other against and save harmless from any and all claims, suits, liability, expense or damage for any alleged or actual infringement or violation of any patent or patent right, arising in connection with the Contract and anything done thereunder; (b) To pay for all materials furnished and work and labor performed under the Contract and to indemnify the other and the Owner against and save them and the premises harmless from any and all claims, suits, or liens therefore, by others; and (c) To obtain and pay for all permits, licenses, and official inspections made necessary by its work and conduct thereof. Each also warrants and guarantees to the other its work and materials and agreed to make good, at its own expense, any defect in materials or workmanship which may occur or develop prior to the Joint Venture's release from responsibility to the Owner therefor. L & A and Fairchild each assumes toward the Joint Venture all the obligations and responsibilities that the Joint Venture assumes toward the Owner, as set forth in the Contract, General and Special Conditions, Drawings, Specifications and other Documents hereinabove referred to, with respect to the materials to be furnished and the work to be performed by the respective parties hereto.

L & A and Fairchild shall each indemnify and protect the other and save it harmless from any and all loss, damage, costs, expenses and attorney's fees suffered or incurred on account of any breach of the aforesaid obligations and covenants, and any other provisions or covenants of this Joint Venture Agreement.

8. Equal Employment Opportunity: L & A and Fairchild agree, each with the other, that as regards all aspects of the employment relationship, from initial recruitment through final lay-off or termination, it will not discriminate against any employee or applicant for employment by reason of race, creed, color, sex or national origin. Each shall comply with and be bound by all provisions of law; all orders, rules, regulations, statutes, and amendments (including but not limited to the Civil Rights Act of 1964 and Executive Order No. 11246) to which its operations hereunder may from time to time be subject. Each further agrees that all provisions incorporated into or made to apply to his portion of the contract or the work to be performed thereunder shall be included in and made a binding part of every subcontract and purchase order issued by him to the extent required by law.

9. Project Manager: Ray A. Sims shall be Project Manager to handle all correspondence and other such related matters between the Owner and the Joint Venture; provided, however, the Project Manager shall obtain the written consent of each of the venturers prior to the execution of any written documents affecting the contractual or otherwise legal rights of such other venturers with the Owner.

10. Assignments, Etc.: Neither L & A nor Fairchild shall assign its rights or responsibilities hereunder without the written consent of the other, other than portions of the work which may be subcontracted to the extent permitted under the Contract.

11. This Agreement shall be deemed and construed a joint venture solely for the purpose of carrying out the Contract as provided herein: and shall in no wise be construed to create a general partnership between the Parties, nor shall it be construed to authorize any Party, for or on behalf of any other Party or the Joint Venture:

A) To bid for or undertake any other contracts; or

B) To borrow money or otherwise pledge credit; or

C) To act generally for or otherwise make or negotiate any contracts, commitments or undertakings.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their respective officers hereunto duly authorized and their respective Corporate Seals affixed hereto, all on the day and year first above written.

L & A CONTRACTING COMPANY

ATTEST:

Secretary

V. Pres.

Title

W. R. FAIRCHILD CONSTRUCTION COMPANY, LT

WITNESS:

Rodney Fairchild

Partner

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF
MISSISSIPPI

JACK N. SEYMOUR, JR., PLAINTIFF

VS. CIVIL ACTION NO. S80-0274(N)

L&A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR. AND BROWN
ENGINEERS, INC., DEFENDANTS

CONSOLIDATED WITH:

IN THE MATTER OF:

L&A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CBS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY. PETITIONERS

CIVIL ACTION NO. S80-0359(N)

BROWN ENGINEERS, INC., CLAIMANT

REQUESTS FOR ADMISSION UNDER FRCP 36

Now comes Defendant W. R. Fairchild Construction Company, Ltd. (Fairchild), and requests the Plaintiff and all co-defendants to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. Fairchild is not a corporation but is a limited partnership. The general partners are Wiley Fairchild, Herbert D. Fairchild, Rodney Fairchild, and Charles D. Fairchild.

2. Fairchild maintains its general office on U.S. Highway 90, north of Hattiesburg, and maintains records within that office. In the construction of the Popps' Ferry new bridge Fairchild drove the test piling and the support piling.

3. Among the records maintained by Fairchild on the driving of test piling and support piling for the new Popps' Ferry Bridge, were reports of Fairchild employees, copies of which are annexed hereto and made a part hereof as Exhibits 1

through 48, inclusive.

4. Each of the original Exhibits 1 through 48 was signed by the employee of Fairchild serving as Foreman.

5. As part of the records kept in the orindary course of its business, Fairchild caused a summary to be made of Exhibits 1 through 48, reflecting the name of the Foreman, the Job Sheet No., the Week Ending, the Kind of Work, Work Size, Performed Footage, and Price, a photocopy of which summary is annexed hereto as Exhibits 49 through 54.

6. The demolition of the Old Popps' Ferry Bridge,

(a) Was done from start to finish by L&A Contracting Company.

(b) Was not done by Fairchild.

(c) Was done by equipment leased or owned by L&A Contracting Company.

(d) Was not done with equipment leased, loaned or owned by Fairchild.

(e) Was done by employees of L&A Contracting Company.

(f) Was not done by employees or loaned employees of Fairchild.

(g) Was directed by employees of L&A Contracting Company.

(h) Was not directed by employees of Fairchild.

(i) Was done after the new Popps' Ferry Bridge had been completed and opened to traffic.

W. R. FAIRCHILD CONSTRUCTION COMPANY,
LTD.

BY WHITE & MORSE

BY:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT
OF MISSISSIPPI

JACK N. SEYMOUR, JR., PLAINTIFF

VS. CIVIL ACTION NO. S80-0274(N)

L&A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR. AND BROWN
ENGINEERS, INC., DEFENDANTS

CONSOLIDATED WITH:

IN THE MATTER OF:

L&A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CBS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY. PETITIONERS

CIVIL ACTION NO. S80-0359(N)

BROWN ENGINEERS, INC., CLAIMANT

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
J[illegible] 1980
HARVEY G. HENDERSON, CLERK
BY [illegible] DEPUTY

NOTICE

TO:

Mr. Joe Sam Owen
Attorney at Law
P. O. Box 673
Gulfport, MS 39501

Mr. Paul J. Delcambre
Attorney at Law
P. O. Drawer 289
Biloxi, MS 39533

Mr. Bobby O'Barr
Attorney at Law
P. O. Box 541
Biloxi, MS 39533

Mr. James K. Carroll
Attorney at Law
934 One Shell Square
New Orleans, LA 70139

Mr. Eldon Bolton, Jr.
Attorney at Law
P. O. Box 1077
Gulfport, MS 39501

Please take notice that the original of the attached copy of Requests for Admission has this day been mailed to the United States District Clerk for filing. Under FRCP36(a), all of the matters set forth in said Requests for Admission shall be admitted unless within thirty days after service of the Requests the parties to whom the Requests is directed serves upon the undersigned counsel for W. R. Fairchild Construction Company, Ltd., a written answer or objection addressed to the matter, signed by the party or his attorney.

This 6th day of June, 1980.

WHITE & MORSE
Attorneys for W. R. Fairchild
Construction Company, Ltd.

BY: ____________________

CERTIFICATE

I, George E. Morse, of counsel for the Defendant W. R. Fairchild Construction Company, Ltd., in the above styled cause, hereby certify that I have this day mailed a true copy of the foregoing Notice and attached Requests for Admission to the above named attorneys at the address shown.

This 6th day of June, 1980.

____

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JUN 13 1980
HARVEY G. [illegible], CLERK
BY DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR.

VERSUS

L & A CONTRACTING COMPANY, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD., GULF COAST PRE-STRESS COMPANY, INC., MOODY BROTHERS OF JACKSONVILLE, INC., RAY SIMS, SR. and BROWN ENGINEERS, INC.

CIVIL ACTION NO.
S80-0274(N)

CONSOLIDATED WITH:

IN THE MATTER OF:

L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY AND MOODY BROTHERS OF JACKSONVILLE, INC., AS OWNERS/OPERATORS OF THE M/V SWITCHER II, BARGE MOBRO 905 AND BARGE CMS 110, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY

CIVIL ACTION NO.
S80-0359(N)

RESPONSE TO REQUEST FOR ADMISSIONS

Comes now Plaintiff-Claimant, Jack N. Seymour, Jr., through his attorney Joe Sam Owen, and files this his Response to the Request for Admissions filed by the Defendant, W. R. Fairchild Construction Company, Ltd., and in responding says as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. (a) Admitted.
   (b) Admitted.
   (c) Admitted.
   (d) Admitted.
   (e) Admitted.
   (f) Admitted.
   (g) Admitted.
   (h) Admitted.

(i) Admitted.

Respectfully submitted,

JACK W. SEYMOUR, JR., Plaintiff-Claimant

By: ______________________________

JOE SAM OWEN, Attorney for Plaintiff-Claimant
1919 23rd Ave.; P. O. Box 673
Gulfport, Mississippi 39501

BOBBY G. O'BARR
Attorney at Law
Post Office Box 541
Biloxi, Mississippi 39533

CERTIFICATE

I, Joe Sam Owen, attorney for Jack W. Seymour, Jr., do hereby certify that I have this date mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Response to Request for Admissions to the Honorable Paul J. Delcambre, attorney for Brown Engineers, Inc., at his usual mailing address of P. O. Drawer 289, Biloxi, Mississippi 39533; Honorable James K. Carroll, attorney for L & A Contracting Company, Gulf Coast Pre-Stress Company and Moody Brothers of Jacksonville, Inc., at his usual mailing address of 934 One Shell Square, New Orleans, Louisiana 70139; Honorable George E. Morse, attorney for W. R. Fairchild Construction Company, Ltd., at his usual mailing address of Post Office Drawer 100, Gulfport, Mississippi 39501.

This the ___ day of June, 1980.

____
JOE SAM OWEN

EXHIBIT 4 (a)

FILED
JUN 1 [illegible]
HARVEY G. HENDERSON, CLERK
DEPUTY
BY

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DIVISION OF THE SOUTHERN
DISTRICT OF MISSISSIPPI, AT BILOXI

CIVIL ACTION NO. S80-0274(N)

JACK W. SEYMOUR, JR.	PLAINTIFF
VERSUS	
L & A CONTRACTING COMPANY, W.R. FAIRCHILD CONSTRUCTION COMPANY, LTD., GULF COAST PRE-STRESS COMPANY, INC., MOODY BROTHERS OF JACKSONVILLE, INC., RAY SIMS, SR., AND BROWN ENGINEERS, INC.	DEFENDANTS

ORDER ALLOWING ATTORNEY TO WITHDRAW AS COUNSEL

This cause having come on this day for hearing on Motion of attorney for Defendant, Moody Brothers of Jacksonville, Inc., to withdraw as attorney of record for said Defendant, and the Court, after having considered said Motion and being fully advised in the premises, is of the opinion the Motion is well taken and should be sustained. It is, therefore,

ORDERED that Roger T. Clark, Esquire, be and he is hereby allowed to withdraw as attorney of record for Defendant, Moody Brothers of Jacksonville, Inc. It is further,

ORDERED that James K. Carrol, Esquire and Eldon Bolton, Esquire, be and they are hereby substituted as counsel of record for Moody Brothers of Jacksonville, Inc.

ORDERED on this the 16th day of June, 1980.

(s) Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

APPROVED:

Eldon Bolton
ATTORNEY FOR MOODY BROTHERS OF JACKSONVILLE, INC., L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY, INC. AND RAY SIMS, SR.

ATTORNEY FOR W.R. FAIRCHILD CONSTRUCTION COMPANY, LTD.

ATTORNEY FOR PLAINTIFF

ATTORNEY FOR BROWN ENGINEERS, INC.

MOODY BROTHERS OF JACKSONVILLE, INC.

A TRUE COPY, I HEREBY CERTIFY.
HARVEY G. HENDERSON, CLERK
BY:
Deputy Clerk

FILED
JUN 25 1980

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI

JACK M. SEYMOUR, JR., **PLAINTIFF**

VS. CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC., **DEFENDANTS**

CONSOLIDATED WITH:

IN THE MATTER OF:

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CMS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY **PETITIONERS**

CIVIL ACTION NO. S80-0359(N)

BROWN ENGINEERS, INC. **CLAIMANT**

ANSWERS TO INTERROGATORIES PROPOUNDED TO W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD.

Now comes W. R. Fairchild Construction Company, Ltd., and for answer to the Interrogatories propounded to it, shows the following:

1. Fairchild is not a corporation, but is a limited partnership. The general partners are Wiley Fairchild, Herbert D. Fairchild, Rodney Fairchild, and Charles D. Fairchild.

2. No. W. R. Fairchild Construction Company, Ltd. (Fairchild) entered into a joint venture contract with L&A Contracting Company (L&A), copies of which have been furnished to all parties, but Fairchild did not participate in the demolition and removal of the Old Popps' Ferry Bridge.

3. There is nothing in the file of Fairchild to indicate that any of its officers executed the contract with Harrison County.

4. It is believed that the checks were issued jointly by Harrison County.

5. None.

6. No.

7. No answer required.

8. None.

9. No.

10. No answer required.

11. Unknown.

12. Unknown.

13. Unknown.

14. Unknown.

15. Unknown.

16. Unknown.

17. Unknown.

18. Unknown.

19. Fairchild had no employees of its own working on the demolition of the Old Popps' Ferry Bridge, therefore, it had no need to promulgate safety rules.

20. None.

21. Unknown.

22. Unknown.

23. Unknown.

24. Since Fairchild had no employees on the job, it could take no steps to prevent the accident.

25. Unknown.

26. Unknown.

27. Unknown.

28. Rodney Fairchild, Bruce Aultman, Hattiesburg, MS. and George E. Morse, Gulfport, Mississippi.

29. Rodney Fairchild signed the joint venture agreement between L&A and Fairchild.

W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD.

BY: Rodney Fairchild

Sworn to and subscribed before me, this 19th day of June, 1980.

Notary Public

My commission expires:

10,117

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JUN 3 0 1983
CLERK
DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR. * CIVIL ACTION
* NO. S80-0274 (N)
versus *
*
L & A CONTRACTING COMPANY, *
W. R. FAIRCHILD CONSTRUCTION *
COMPANY, LTD., GULF COAST *
PRE-STRESS COMPANY, INC., *
MOODY BROTHERS OF JACKSONVILLE, *
INC., RAY SIMS, SR. AND BROWN *
ENGINEERS, INC. *

CONSOLIDATED WITH: *

IN THE MATTER OF: * CIVIL ACTION
* NO. S80-0359 (N)
L & A CONTRACTING COMPANY, *
GULF COAST PRE-STRESS COMPANY *
AND MOODY BROTHERS OF JACKSONVILLE, *
INC., AS OWNERS/OPERATORS OF THE *
M/V SWITCHER II, BARGE MOBRO 905 *
AND BARGE CMS 110, PRAYING FOR *
EXONERATION FROM OR LIMITATION *
OF LIABILITY *

* * * * * * * * * * *

RESPONSE TO REQUEST FOR ADMISSIONS

Now into Court, through undersigned counsel, come L & A Contracting Company, Gulf Coast Pre-Stress Company and Moody Brothers of Jacksonville, Inc., hereinafter "petitioners", and for response to the request for admissions filed by defendant, W. R. Fairchild Construction Company, Ltd., do allege and aver upon information and belief as follows:

1. Petitioners lack sufficient knowledge or information to admit or deny the information contained in this request.

2. Petitioner, L & A Contracting Company, admits that in the construction of the new Popps Ferry bridge, Fairchild drove the test piling and support piling. Petitioners, L & A Contracting Company and Gulf Coast Pre-Stress Company admit that Fairchild maintains offices on U. S. Highway 98 north of Hattiesburg. Except as admitted, petitioners lack sufficient knowledge or information to admit or deny the information contained in request No. 2.

3. Petitioner, L & A Contracting Company, admits the information contained in request No. 3. Petitioners, Gulf Coast Pre-Stress Company and Moody Brothers of Jacksonville, Inc., lack sufficient knowledge or information to either admit or deny the information contained in request No. 3.

4. Petitioners lack sufficient knowledge or information either to admit or deny the information contained in request No. 4.

5. Petitioners lack sufficient knowledge or information either to admit or deny request No. 5.

6. a. Admitted.
   b. Admitted.
   c. Admitted.
   d. Admitted.
   e. Admitted.
   f. Admitted.
   g. Admitted.
   h. Admitted.
   i. Admitted.

Respectfully submitted:

JAMES K. CARROLL, Trial Attorney

GERARD T. GELPI, Trial Attorney
and
GELPI, SULLIVAN, CARROLL & LABORDE
934 One Shell Square
New Orleans, LA 70139
Telephone 524-9714
Attorneys for L & A Contracting Company, Gulf Coast Pre-Stress Company and Moody Brothers of Jacksonville, Inc.

ELDON L. BOLTON, JR., Trial Att'y.
P. O. Box 4077
Gulfport, Mississippi 39501

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 22 day of June 19 82 served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

FILED
JUL 8 1980
HARVEY G. HENDERSON, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR. PLAINTIFF

VERSUS CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC. DEFENDANTS

CONSOLIDATED WITH:

IN THE MATTER OF:

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SPITFIRE II, BARGE MORRO 905
AND BARGE GCS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY CIVIL ACTION NO. S80-0359(N)

CONSENT ORDER ALLOWING SECOND AMENDED SUIT AND AMENDED CLAIM AND ANSWER OF JACK N. SEYMOUR, JR.

This day this cause came on for hearing by consent of all parties in the above action to allow the Plaintiff-Claimant, Jack N. Seymour, Jr., to amend his suit under the Jones Act and General Maritime Law for Maintenance and Cure and to amend his claim and answer under the Limitation proceeding and the Court being advised in the premises is of the considered opinion that the pleadings as specified above should be amended. It is therefore,

ORDERED AND ADJUDGED that the Plaintiff, Jack N. Seymour, Jr., be and he is hereby granted the right to amend his amended suit under the Jones Act and General Maritime Law for Maintenance and Cure, Wages, Unseaworthiness, and Negligence so as to add an additional cause of action under 33 U.S.C.A. 905(b). It is further

ORDERED AND ADJUDGED that the Claimant, Jack N. Seymour, Jr., be and he is hereby allowed to amend his claim and answer under the above Limitation proceeding so as to add an additional claim under 33 U.S.C.A. 905(b).

SO ORDERED AND ADJUDGED this the 5th day of July, 1980.

/s/ Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

CONSENT TO AMENDMENT AS TO FORM:

JOE SAM OWEN, Attorney for Plaintiff-Claimant,
Jack N. Seymour, Jr.

James K. Carroll
JAMES K. CARROLL, Attorney for L & A Contracting
Company, Gulf Coast Pre-Stress Company, Inc.,
Healy Brothers of Jacksonville, Inc., and
Ray Sims, Sr.

A TRUE COPY, I HEREBY CERTIFY.
HARVEY G. HENDERSON, CLERK
BY:
Deputy Clerk

GEORGE E. PACE, Attorney for W. R. Fairchild
Construction Company, Ltd.

Paul J. Delcambre
PAUL J. DELCAMBRE, Attorney for Brown Engineers,
Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR. **PLAINTIFF**

CIVIL ACTION NO. S80-0274(N)

VERSUS

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC. **DEFENDANTS**

FILED
[illegible] 14 1980

CONSOLIDATED WITH:

IN THE MATTER OF:

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CTS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY

CIVIL ACTION NO. S80-0359(N)

SECOND AMENDED SUIT UNDER THE JONES ACT AND GENERAL MARITIME LAW FOR MAINTENANCE AND CURE, WAGES, UNSEAWORTHINESS, NEGLIGENCE AND UNDER 33 U.S.C.A. 905(b)

The second Amended Complaint of Jack N. Seymour, Jr., a person of full age of majority and a citizen of the State of Mississippi, through undersigned counsel, complaining of L & A Contracting Company, W. R. Fairchild Construction Company, Ltd., Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., and Brown Engineers, Inc., Defendants herein, with respect represents:

I.

That by reference, each and every allegation set forth in Paragraph I. through XXVI. of the original Complaint, including the separate six causes of action, are readopted and made a part of this Second Amended Complaint to the extent as if each allegation was manually copied herein.

II.

That by reference, each and every allegation set forth in Paragraphs XXVII through XXX of the First Amended Suit, designated therein Seventh Cause of Action, are readopted and made a part of this Second Amended

Complaint to the extent as if each allegation was manually copied herein.

XXXI.

FOR AN EIGHTH CAUSE OF ACTION

(MAINTENANCE AND CURE, PUNITIVE DAMAGES, AND UNPAID WAGES)

For an Eighth cause of action, the Plaintiff repeats and realleges each and every allegation hereinbefore stated with the same force and effect as if the same were again herein set forth in full.

XXXII.

Upon the Plaintiff becoming ill and injured as aforesaid, it became the duty of the Defendant, L & A Contracting Company, to furnish the Plaintiff with proper medical care, attention and medicines and the expenses of maintenance and cure.

XXXIII.

That said Defendant has negligently and willfully failed to pay to the Plaintiff the expense of his maintenance while incapacitated and that the expense of his medical care, attention, medicines and maintenance is $195,000.00, no part of which has been paid, although demanded. Plaintiff would further allege that the Defendant, L & A Contracting Company, has willfully and intentionally refused to pay maintenance and cure for which your Plaintiff is entitled to punitive damages in an additional amount of $500,000.00.

XXXIV.

That upon the Plaintiff becoming injured, the Defendant owed the Plaintiff unpaid wages for which he demands the sum of $1,000.00.

XXXV.

The Plaintiff, as a direct result of the acts, omissions and commissions of the Defendants described herein, or any one act thereof, under the various causes of action specified herein, itemizes his damages as follows:

a.	Physical and personal injuries with resulting pain and discomfort, distress, permanent disability, past, present and future.	$ 3,000,000.00
b.	Emotional and mental anguish as a result of the urological, orthopaedic and neurological injuries.	2,000,000.00

c. Loss of wages and income, past and impairment of earning capacity, present and future,	$ 750,000.00
d. Future medical, hospital, pharmaceutical, therapeutical, nursing care and drug expenses, and home nursing care and medical and therapeutical expenses,	250,000.00
	$ 6,000,000.00

XXXVI.

FOR A NINTH CAUSE OF ACTION

(33 U.S.C.A. 905(b)

The Plaintiff adopts and realleges each and every allegation contained in the preceding Paragraphs including the allegations set forth in the original and Amended Suit.

XXXVII.

This action, as an alternative claim, arises under 33 U.S.C.A. 905(b).

XXXVIII.

That on or about September 25, 1979 Jack N. Seymour, Jr. was aboard the Barge MOBRO 905 pursuant to his employment by the Defendant, L & A Contracting Company.

XXXIX.

That the M/V Switcher II, Barge MOBRO 905 and the Barge CMS 110 were vessels within the meaning of 33 U.S.C.A. 902(21) and the Defendants, L & A Contracting Company, W. R. Fairchild Construction Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc. and Ray Sims, Sr. were the Owners, Owners, pro hac vice, agents, operators, charterers or bare boat charterers, masters, officers and controlled said vessels on or about September 25, 1979. That the Plaintiff, Jack N. Seymour, Jr., was seriously injured as the result of the negligence of the above vessels and the negligence of L & A Contracting Company, W. R. Fairchild Construction Company, Ltd., Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., and Ray Sims, Sr. That the total loss incurred by the Plaintiff in this cause of action is included in the ad damnum clause set forth below.

WHEREFORE, the Plaintiff prays for judgment herein in his favor and against the Defendants, as set forth in the various causes of action specified in the preceding paragraphs, in the following respects:

a. The sum of $195,000.00, medical care, attention, medicines and maintenance from the Defendant, L & A Contracting Company.

b. The sum of $500,000.00 punitive damages against the Defendant, L & A Contracting Company, for its willful and intentional refusal to provide maintenance and cure.

c. The sum of $1,000.00 unpaid wages from the Defendant, L & A Contracting Company.

d. The sum of $6,000,000.00, compensatory damages, from the Defendants, L & A Contracting Company, W. R. Fairchild Construction Company, Ltd., Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr. and Brown Engineers, Inc., jointly and severally, as specified in the preceding causes of action.

e. The Plaintiff prays for the above together with pre-judgment and post-judgment interest as well as all costs that may accrue herein.

Respectfully submitted,

JACK M. SEYMOUR, JR., Plaintiff

By:

JOE SAM OWEN, Attorney for Plaintiff
1919 23rd Ave.; P. O. Box 673
Gulfport, Mississippi 39501
(601) 868-2821

BOBBY G. O'BARR
Attorney at Law
Post Office Box 541
Biloxi, Mississippi 39501
(601) 435-5536

CERTIFICATE OF SERVICE

I, JOE SAM OWEN, Attorney for Jack M. Seymour, Jr., do [illegible] that I have this day forwarded by United States mail, postage [illegible] true and correct copy of the above and foregoing Second Amended [illegible] Jones Act and General Maritime Law for Maintenance and Cure, [illegible] worthiness, Negligence and Under 33 U.S.C.A. 905(b) to the [illegible] K. Carroll, Colpi, Sullivan, Carroll & Laborde, at his usual [illegible] of 934 One Shell Square, New Orleans, Louisiana 70139; and the [illegible] Eldon L. Bolton, Jr., at his usual mailing address of Security [illegible] Building, Gulfport, Mississippi 39501; and to the Honorable [illegible]

Morse, White & Morse, at his usual mailing address of Post Office Drawer 100, Gulfport, Mississippi 39501; and the Honorable Paul J. Delcambre, at his usual mailing address of Post Office Drawer 289, Biloxi, Mississippi 39533.

This the 3rd day of July, 1980.

JOE SAM OWEN

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR. — PLAINTIFF

VERSUS — CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC. — DEFENDANTS

FILED

CONSOLIDATED WITH:

IN THE MATTER OF:

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE C&S 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY — CIVIL ACTION NO. S80-0359(N)

SECOND AMENDED SUIT UNDER THE JONES ACT AND GENERAL MARITIME LAW FOR MAINTENANCE AND CURE, WAGES, UNSEAWORTHINESS, NEGLIGENCE AND UNDER 33 U.S.C.A. 905(b)

The second Amended Complaint of Jack N. Seymour, Jr., a person of full age of majority and a citizen of the State of Mississippi, through undersigned counsel, complaining of L & A Contracting Company, W. R. Fairchild Construction Company, Ltd., Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., and Brown Engineers, Inc., Defendants herein, with respect represents:

I.

That by reference, each and every allegation set forth in Paragraph I. through XXVI. of the original Complaint, including the separate six causes of action, are readopted and made a part of this Second Amended Complaint to the extent as if each allegation was manually copied herein.

II.

That by reference, each and every allegation set forth in Paragraphs XXVII through XXX of the First Amended Suit, designated therein Seventh Cause of Action, are readopted and made a part of this Second Amended [illegible]

Complaint to the extent as if each allegation was manually copied herein.

XXXI.

FOR AN EIGHTH CAUSE OF ACTION

(MAINTENANCE AND CURE, PUNITIVE DAMAGES, AND UNPAID WAGES)

For an Eighth cause of action, the Plaintiff repeats and realleges each and every allegation hereinbefore stated with the same force and effect as if the same were again herein set forth in full.

XXXII.

Upon the Plaintiff becoming ill and injured as aforesaid, it became the duty of the Defendant, L & A Contracting Company, to furnish the Plaintiff with proper medical care, attention and medicines and the expenses of maintenance and cure.

XXXIII.

That said Defendant has negligently and willfully failed to pay to the Plaintiff the expense of his maintenance while incapacitated and that the expense of his medical care, attention, medicines and maintenance is $195,000.00, no part of which has been paid, although demanded. Plaintiff would further allege that the Defendant, L & A Contracting Company, has willfully and intentionally refused to pay maintenance and cure for which your Plaintiff is entitled to punitive damages in an additional amount of $300,000.00.

XXXIV.

That upon the Plaintiff becoming injured, the Defendant owed the Plaintiff unpaid wages for which he demands the sum of $1,000.00.

XXXV.

The Plaintiff, as a direct result of the acts, omissions and commissions of the Defendants described herein, or any one act thereof, under the various causes of action specified herein, itemizes his damages as follows:

a.	Physical and personal injuries with resulting pain and discomfort, distress, permanent disability, past, present and future,	$ 3,000,000.00
b.	Emotional and mental anguish as a result of the urological, orthopedic and neurological injuries,	2,000,000.00

c. Loss of wages and income, past and impairment of earning capacity, present and future,	$ 750,000.00
d. Future medical, hospital, pharmaceutical, therapeutical, nursing care and drug expenses, and home nursing care and medical and therapeutical expenses,	250,000.00
	$ 6,000,000.00

XXXVI.

FOR A NINTH CAUSE OF ACTION

(33 U.S.C.A. 905(b)

The Plaintiff adopts and realleges each and every allegation contained in the proceeding Paragraphs including the allegations set forth in the original and Amended Suit.

XXXVII.

This action, as an alternative claim, arises under 33 U.S.C.A. 905(b).

XXXVIII.

That on or about September 25, 1979 Jack N. Seymour, Jr. was aboard the Barge MOBRO 905 pursuant to his employment by the Defendant, L & A Contracting Company.

XXXIX.

That the M/V Switcher II, Barge MOBRO 905 and the Barge CMS 110 were vessels within the meaning of 33 U.S.C.A. 902(21) and the Defendants, L & A Contracting Company, W. R. Fairchild Construction Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc. and Ray Sims, Sr. were the Owners, Owners, pro hac vice, agents, operators, charterers or bare boat charterers, masters, officers and controlled said vessels on or about September 25, 1979. That the Plaintiff, Jack N. Seymour, Jr., was seriously injured as the result of the negligence of the above vessels and the negligence of L & A Contracting Company, W. R. Fairchild Construction Company, Ltd., Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., and Ray Sims, Sr. That the total loss incurred by the Plaintiff in this cause of action is included in the ad damnum clause set forth below.

WHEREFORE, the Plaintiff prays for judgment herein in his favor and against the Defendants, as set forth in the various causes of action specified in the preceding paragraphs, in the following respects:

a. The sum of $195,000.00, medical care, attention, medicines and maintenance from the Defendant, L & A Contracting Company.

b. The sum of $500,000.00 punitive damages against the Defendant, L & A Contracting Company, for its willful and intentional refusal to provide maintenance and cure.

c. The sum of $1,000.00 unpaid wages from the Defendant, L & A Contracting Company.

d. The sum of $6,000,000.00, compensatory damages, from the Defendants, L & A Contracting Company, W. R. Fairchild Construction Company, Ltd., Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr. and Brown Engineers, Inc., jointly and severally, as specified in the preceding causes of action.

e. The Plaintiff prays for the above together with pre-judgment and post-judgment interest as well as all costs that may accrue herein.

Respectfully submitted,

JACK N. SEYMOUR, JR., Plaintiff

By: ______________________________
JOE SAM OWEN, Attorney for Plaintiff
1919 23rd Ave.; P. O. Box 673
Gulfport, Mississippi 39501
(601) 868-2821

BOBBY G. O'BARR
Attorney at Law
Post Office Box 541
Biloxi, Mississippi 39501
(601) 435-5536

CERTIFICATE OF SERVICE

I, JOE SAM OWEN, Attorney for Jack N. Seymour, Jr., do hereby certify that I have this day forwarded by United States mail, postage prepaid, a true and correct copy of the above and foregoing Second Amended Suit Under the Jones Act and General Maritime Law for Maintenance and Cure, Wages, Unseaworthiness, Negligence and Under 33 U.S.C.A. 905(b) to the Honorable James K. Carroll, Gelpi, Sullivan, Carroll & Laborde, at his usual mailing address of [illegible]34 One Shell Square, New Orleans, Louisiana 70139; and the Honorable Eldon L. Bolton, Jr., at his usual mailing address of Security Savings Building, Gulfport, Mississippi 39501; and to the Honorable George E.

Morse, White & Morse, at his usual mailing address of Post Office Drawer 100, Gulfport, Mississippi 39501; and the Honorable Paul J. Delcambre, at his usual mailing address of Post Office Drawer 289, Biloxi, Mississippi 39533.

This the 1 day of July, 1980.

JOE SAM OWEN

JOINT VENTURE AGREEMENT

THIS AGREEMENT dated December 6, 1976, by and between L & A Contracting Company, a Mississippi Corporation, with offices at Hattiesburg, Mississippi, hereinafter referred to as "L & A ", and W. R. Fairchild Construction Company, Ltd. a limited partnership, with offices at Hattiesburg, Mississippi hereinafter referred to as "Fairchild".

WITNESSETH, THAT

WHEREAS, L & A and Fairchild have as joint venturers submitted a bid for the construction of Popps Ferry Bridge Project Across the Back Bay of Biloxi, Mississippi to the Harrison County Development Commission, Harrison County, Mississippi, (The "Owner"); and

WHEREAS said bid was the lowest submitted to the Owner, and as a result thereof the Owner has entered into a contract with L & A and Fairchild as Joint Venturers calling for performance of the work (the "Contract"); and

WHEREAS, L & A and Fairchild mutually desire to establish their respective rights and responsibilities in respect to such Contract and the work to be performed thereunder:

NOW THEREFORE,

The parties hereto hereby agree as follows:

[illegible] Performance [illegible] shall perform or be responsible for performance of the following items of work and shall be entitled to receive and retain all payments from the Owner on account of the performance of the said items of work:

PAY ITEM NUMBER	APPROX. QUANTITY	UNIT	ITEM
201-A	Lump Sum	L.S.	Clearing and Grubbing
SP-202-A	Lump Sum	L.S.	Removal of Existing Bridge Superstructure & Substructure
SP-202-B	Lump Sum	L.S.	Removal of Fenders
SP-202-C	Lump Sum	L.S.	Removal of Operator's House
SP-203-A	1,600.0	C/Y	Unclassified Excavation (FM)
203-EX	3,500.0	C/Y	Borrow Excavation (CP)(LVM)
SP-323	Lump Sum	L.S.	Class "B" In-Grade Preparation
301-1	1,000.0	Ton	8" Plant Mix Bituminous Base Course, Type I
401-1	1,6[illegible].0	Ton	3" Hot Bituminous Pavement Surface Course, Type I
603-1	28.0	L/F	24" Reinforced Concrete Pipe, Class III
603-2	4	Each	24" Reinforced Concrete Flared End Section [illegible]
603-8	1[illegible].0	L/F	6" Vit. Clay San. Sewer Pipe, Rubber Gasket Jt. (Std.Str. [illegible]
SP-6[illegible]	1	Unit	Sanitary Sewer Manhole
617-5	11	Each	R.O.W. Markers, Type II
SP-618	Lump Sum	L.S.	Maintenance of Traffic
SP-621	Lump Sum	L.S.	Engineers Field Office
606-A	100.0	L/F	Beam Type Guard Rail
619-1	9.182	Mile	Traffic Stripe (Skip White)
619-2	1.509	Mile	Traffic Stripe (Cont. White)
619-5	1.509	Mile	Traffic Stripe (Cont. Yellow)
[illegible]-B	6,100.0	S/Y	Standard Ground Preparation Type II
656-A	[illegible].5	Ton	Agricultural Limestone
656-[illegible]	0.5	Ton	Combination Fertilizer [illegible]
[illegible]	0.25	Ton	Ammonium Nitrate
[illegible]	15.0	Lb.	Seeding (Common Bermuda)
[illegible]	40.0	Lb.	Seeding (Bahia Grass)
[illegible]A	1.0	Ton	Vegetative Material for Mulch Type I

PAY ITEM NUMBER	APPROX. QUANTITY	UNIT	ITEM
659-B	450.0	Gal.	Bituminous Material for Mulch
664	190.0	S/Y	Solid Sodding
804-AA	870.0	C/Y	Class "AA" Bridge Concrete
804-B	5,865.0	C/Y	Class "B" Bridge Concrete
804-T	12,537.0	L/F	50 Ft. Prestressed Concrete Bea Type III
804-T	2,233.75	L/F	90 Ft. Prestressed Concrete Bea Type IV
805	1,357,313.0	Lb.	Reinforcement
810-B	Lump Sum	L.S.	Steel Superstructure
812-A	6,062.0	S/F	Steel Grid Floor (5"Open Type)
812-B	1,735.0	S/F	Steel Grid Floor(5" Concrete Fi
812-B	1,045.0	S/F	Steel Grid Floor (2" Conc.Fille
813-A	7,481.0	L/F	Concrete Railing
813-E	190.0	L/F	Steel Roadway Railing
813-E	3,010.0	L/F	Aluminum Sidewalk Railing
813-H	864.0	L/F	Steel Pipe Railing
SP-821	Lump Sum	L.S.	Operators House
SP-824	460.0	C/Y	Concrete Counterweight
SP-825	157,[illegible].0	Lb.	Counterweight Billets
SP-826	Lump Sum	L.S.	Operating Machinery
SP-827	Lump Sum	L.S.	Electrical Work
820-A	29.000	M.B.M.	Treated Timber

Fairchild will perform or be responsible for performance of the following other items of work called for under the Contract, and shall be entitled to receive and retain all payments from the Owner on account of the performance of said items of work, at the unit prices indicated herein:

PAY ITEM NUMBER	APPROX. QUANTITY	UNIT	ITEM	UNIT PRICE
DRIVE ONLY:				
SP-803-A	8	Each	Test Piles, 18" x 18" Prestressed Concrete	5,500.00 Ea.
SP-803-A	6	Each	Test Piles, 24" x 24" Prestressed Concrete	9,500.00 Ea.
SP-803-A1	4	Each	Redriving Piles, 18" x 18" Prestressed Concrete	500.00 Ea.
SP-803-A1	2	Each	Redriving Piles, 24" x 24" Prestressed Concrete	500.00 Ea.
SP-803-B	4	Each	Loading Test, 18" x 18" Prestressed Concrete	4,600.00 Ea.
SP-803-B	2	Each	Loading Test, 24"x 24" Prestressed Concrete	4,880.00 Ea.
SP-803-B1	4	Each	Reloading Test, 18" x 18" Prestressed Concrete	500.00 Ea.
SP-803-B1	2	Each	Reloading Test, 24" x 24" Prestressed Concrete	500.00 Ea.
803-F	21,695.0	L/F	Prestressed Concrete Piling 18"x 18"	9.40 L/
803-F	15,810.0	L/F	Prestressed Concrete Piling 24" x 24"	14.55 L/
FURNISH & DRIVE ONLY:				
803-D	19,000.0	L/F	Treated Timber Piling	6.75 L/

L & A shall further undertake to comply with all requirements for traffic control and protection of the traveling public. This shall include provision of all signs, markers and other traffic control and safety devices, and signals.

L & A and Fairchild agree, each with the other, to separately perform its assigned portion of the Contract and all work incident thereto, using its own materials, labor, supervision, machinery, equipment, tools, supplies, and subcontractors, in strict accordance with the terms and conditions of the contract, including [illegible] general and special conditions, plans, specifications, and other [illegible] forming or by reference made a part thereof, all of which shall [illegible] reference be considered a part of the Contract.

Each is to bear full and complete responsibility for completing its work satisfactorily and on time, all in accordance with said contract or specifications; neither shall be liable to the other or to the Owner for any failure of the other to so perform and complete its work; furthermore, each will be responsible for any sales, use or excise taxes relating to its portion of the work to be performed and will carry their own insurance. L & A will pay the premium on the bond required by the owner.

2. Independent Contractor: L & A and Fairchild agree, each with the other, that each will be an independent contractor in the performance of its assigned portion of the work.

3. Liquidated Damages: Any and all liquidated and other damages which may be assessed against the Joint Venture by reason of acts or omissions of one of the parties, including but not limited to acts or omissions resulting in the failure of said party to complete its assigned portion of the Contract within the time set forth in the project schedule, shall be paid by such party; and such party shall indemnify the other against any loss, damage or injury by reason of the assessment of such damages. The payment of such damages shall not release such party from its obligation to fully perform its commitments hereunder and to pay all damages the Joint Venture may sustain by reason of the failure of such party to so perform.

4. Disputes: All disputes and disagreements between the Parties pertaining to this Joint Venture which cannot be resolved by mutual agreement shall be submitted for arbitration to three (3) arbitrators. One arbitrator will be selected by each party to this Agreement [illegible] and the third arbitrator will be selected by the first two arbitrators picked. The arbitrators shall hear such dispute within 5 days following the date of submission,

and shall render their majority decision within 10 days after the conclusion of such hearing. The arbitrator's decision as to such each and every dispute and disagreement shall be final and binding on all Parties and may be enforceable in any court of record having jurisdiction over one or more of the Parties. The rules of Commercial Arbitration of the American Arbitration Association shall determine the conduct of all arbitration proceedings hereunder.

5. Retainages: In the event the Owner retains any monies due unto the parties hereto, each party shall be entitled to receive its appropriate share and percentage of such retention, and any interest payments accruing thereto, as relates to its performance of work under the Contract.

6. Handling of Funds: The parties to this Joint Venture hereby authorize L & A to endorse checks from the Owner in the name of the venture and make appropriate payments to Fairchild and/or othe thereafter in distribution of the funds received.

7. Insurance and Bonding: L & A and Fairchild shall each provide and maintain compensation for the protection of its employees, as required by law of an employer and as will protect it from loss or damage because of personal injuries including death, to its employees, or any of them; and minimum public liability and property damage insurance as follows:

Public Liability
Bodily Injury/Property Damage
$250,000/$500,000

Automobile Public Liability:
Bodily Injury/ Property Damage
$250,000/$500,000

8. L & A and Fairchild each specifically obligates itself to indemnify, protect, and save the other harmless from any and all claims, suits or liabilities for injuries to property, injuries

to persons, including death, and from any other claims, suits or liabilities arising out of the performance of its portion of the work, or in any way occasioned by any act or omission of such party or any of its officers, agents, employees, or servants or any subcontractor or other person directly or indirectly engaged by it. All of the insurance policies as herein before provided under this section ~~[illegible]~~, shall serve to indemnify and protect the Joint Venture and save it harmless from all claims, suits or liabilities as set forth herein.

All of said certificates shall set forth on the face thereof contractual coverage as required herein. No amendment or cancellation of any of said policies shall be effective until after thirty (30) days' notice in writing to all parties to this agreement.

L & A and Fairchild further each specifically obligates itself: (a) To indemnify the other against and save harmless from any and all claims, suits, liability, expense or damage for any alleged or actual infringement or violation of any patent or patent right, arising in connection with the Contract and anything done thereunder: (b) To pay for all materials furnished and work and labor performed under the Contract and to indemnify the other and the Owner against and save them and the premises harmless from any and all claims, suits, or liens therefore, by others: and (c) To obtain and pay for all permits, licenses, and official inspections made necessary by its work and conduct

t . Each also warrants and guarantees to the other its work

a terials and agreed to make good, at its own expense, any

t in materials or workmanship which may occur or

p prior to the Joint Venture's release from responsibility

e Owner therefor. L & A and Fairchild each assumes

t l the Joint Venture all the obligations and responsibilities that the Joint Venture assumes toward the Owner, as set forth in the Contract, General and Special Conditions, Drawings, Specifications and other Documents hereinabove referred to, with respect to the materials to be furnished and the work to be performed by the respective parties hereto.

L & A and Fairchild shall each indemnify and protect the other and save it harmless from any and all loss, damage, costs, expenses and attorney's fees suffered or incurred on account of any breach of the aforesaid obligations and covenants, and any other provisions or covenants of this Joint Venture Agreement.

8. Equal Employment Opportunity: L & A and Fairchild agree, each with the other, that as regards all aspects of the employment relationship, from initial recruitment through final lay-off or termination, it will not discriminate against any employee or applicant for employment by reason of race, creed, color, sex or national origin. Each shall comply with and be bound by all provisions of law; all orders, rules, regulations, statutes, and amendments (including but not limited to the Civil Rights Act of 1964 and Executive Order No. 11246) to which its operations hereunder may from time to time be subject. Each further agrees that all provisions incorporated into or made to apply to his portion of the contract or the work to be performed thereunder shall be included in and made a binding part of every subcontract and purchase order issued by him to the extent required by law.

9. Project Manager: Ray A. Sims shall be Project Manager to handle all correspondence and other such related matters between the Owner and the Joint Venture; provided, however, the Project Manager shall obtain the written consent of each of the venturers prior to the execution of any written documents affecting the contractual or otherwise legal rights of such other venturers with the Owner.

10. Assignments, Etc.: Neither L & A nor Fairchild shall assign its rights or responsibilities hereunder without the written consent of the other, other than portions of the work which may be subcontracted to the extent permitted under the Contract.

11. This Agreement shall be deemed and construed a joint venture solely for the purpose of carrying out the Contract as provided herein; and shall in no wise be construed to create a general partnership between the Parties, nor shall it be construed to authorize any Party, for or on behalf of any other Party or the Joint Venture:

A) To bid for or undertake any other contracts; or
B) To borrow money or otherwise pledge credit; or
C) To act generally for or otherwise make or negotiate any contracts, commitments or undertakings.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their respective officers hereunto duly authorized and their respective Corporate Seals affixed hereto, all on the day and year first above written.

L & A CONTRACTING COMPANY

ATTEST:

Secretary

V. Pres.
Title

W. R. FAIRCHILD CONSTRUCTION COMPANY,

WITNESS:

Partner

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT
OF MISSISSIPPI

JACK N. SEYMOUR, JR.

VS. CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR. AND BROWN
ENGINEERS, INC.

FILED
JUL 17 1980

CONSOLIDATED WITH

IN THE MATTER OF: CIVIL ACTION NO. S80-0359(N)

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CMS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY

NOTICE

TO: Joe Sam Owen
Attorney at Law
P. O. Box 673
Gulfport, MS 39501

Bobby O'Barr
Attorney at Law
P. O. Box 541
Biloxi, MS 39533

Mr. James K. Carroll
Attorney at Law
931 One Shell Square
New Orleans, LA 70139

Mr. Eldon Bolton, Jr.
Attorney at Law
P. O. Box 4077
Gulfport, MS 39501

Mr. Paul J. Delcambre, Jr.
Attorney at Law
P. O. Drawer 289
Biloxi, MS 39530

Please take notice that the original o[illegible] Motion for Summary Judgment has this day been [illegible] Clerk for filing, and that the same will be call[illegible] Hon. Walter Nixon, Jr., United States Distric[illegible] chambers, Federal Building, Biloxi, Mississippi [illegible] of September, 1980, at 9:30 a.m., or at such other time as may be convenient with the Court.

This 16th day of July, 1980.

WHITE & MORSE
BY:

CERTIFICATE

I, George E. Morse, of counsel for W. R. Fairchild Construction Company, Ltd., in the above styled cause, hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing Notice and attached Motion for Summary Judgment to the above named attorneys at the addresses shown.

This 16th day of July, 1980.

EXHIBIT 4 (b)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT
OF MISSISSIPPI

JACK N. SEYMOUR, JR.,

VS. CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR. AND BROWN
ENGINEERS, INC.

FILED
JUL 17 1980

CONSOLIDATED WITH:

IN THE MATTER OF:

L & A CONTRACTING COMPANY, CIVIL ACTION NO. S80-0358(N)
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CMS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY

MOTION FOR SUMMARY JUDGMENT

Now comes W. R. Fairchild Construction Company, Ltd. (Fairchild), and moves the Court to enter, pursuant to FRCP 56, a summary judgment in the defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact, and that the Defendant is entitled to a judgment as a matter of law. This motion is based upon:

1. Requests for Admission propounded by Fairchild to Jack N. Seymour, Jr. and his responses.

2. The deposition of Jack N. Seymour, Jr.

3. The deposition of Charles Sindle.

4. The deposition of George Lee.

5. The deposition of Ray A. Sims.

6. The contract between Fairchild and L&A Contracting Company, dated December 6, 1978, being Exhibit "A" to the counterclaim of Fairchild contained in its Answer.

Respectfully submitted,

WHITE & MORSE

BY:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT
OF MISSISSIPPI

JACK N. SEYMOUR, JR.

VS. CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD., GULF COAST PRE-STRESS COMPANY, INC., MOODY BROTHERS OF JACKSONVILLE, INC., RAY SIMS, SR. AND BROWN ENGINEERS, INC.

CONSOLIDATED WITH

IN THE MATTER OF: CIVIL ACTION NO. S80-0359(N)

L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY AND MOODY BROTHERS OF JACKSONVILLE, INC., AS OWNERS/OPERATORS OF THE M/V SWITCHER II, BARGE MOBRO 905 AND BARGE CMS 110, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JUL 1 1980
BY

NOTICE

TO:

Joe Sam Owen
Attorney at Law
P. O. Box 673
Gulfport, MS 39501

Bobby O'Barr
Attorney at Law
P. O. Box 541
Biloxi, MS 39533

Mr. James K. Carroll
Attorney at Law
934 One Shell Square
New Orleans, LA 70139

Mr. Eldon Bolton, Jr.
Attorney at Law
P. O. Box 4077
Gulfport, MS 39501

Mr. Paul J. Delcambre, Jr.
Attorney at Law
P. O. Drawer 289
Biloxi, MS 39530

Please take notice that the original of the attached Motion for Summary Judgment has this day been mailed to the Clerk for filing, and that the same will be called up before Hon. Walter Nixon, Jr., United States District Judge, in his chambers, Federal Building, Biloxi, Mississippi, on the 3rd day of September, 1980, at 9:30 a.m., or at such other time as may be convenient with the Court.

This 16th day of July, 1980.

WHITE & MORSE

BY: ______________________

CERTIFICATE

I, George E. Morse, of counsel for W. R. Fairchild Construction Company, Ltd., in the above styled cause, hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing Notice and attached Motion for Summary Judgment to the above named attorneys at the addresses shown.

This 16th day of July, 1980.

____

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF
MISSISSIPPI

JACK N. SEYMOUR, JR.

VS. CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., MAY SIMS, SR., AND BROWN
ENGINEERS, INC.

CONSOLIDATED WITH

IN THE MATTER OF: CIVIL ACTION NO. S80-0398(N)

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CMB 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY

FILED
SEP 3

JUDGMENT OF DISMISSAL

This cause coming on this day to be heard on motion of W. R. Fairchild Construction Company, Ltd. for summary judgment, and upon documentary evidence, it appears to the Court that said motion should be sustained, it is, therefore,

ORDERED, that the motion of W. R. Fairchild Construction Company, Ltd., for summary judgment, be and the same is hereby sustained as to the claim of the Plaintiff Jack N. Seymour, Jr., and it is further

ORDERED, that judgment for and on behalf of W. R. Fairchild Construction Company, Ltd. is hereby entered in its behalf and against Jack N. Seymour, Jr., and it is further

ORDERED, that the claim of Jack N. Seymour, Jr. against W. R. Fairchild Construction Company, Ltd. be and the same is hereby dismissed with prejudice, the parties to bear their respective costs, and it is finally

ORDERED, that the crossclaim of W. R. Fairchild Construction Company, Ltd. against L & A Contracting Company be

: B - 195
[illegible]

and the same is hereby dismissed without prejudice.

ORDERED, this 3d day of September, 1980.

Walter L. Nixon Jr.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI

JACK N. SEYMOUR, JR.

VS. CIVIL ACTION NO. S80-0376(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC.

CONSOLIDATED WITH

IN THE MATTER OF: CIVIL ACTION NO. S80-0389(N)

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CMS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
SEP 2 - 1980
HARVEY G. HENDERSON, CLERK
DEPUTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER FRCP 52

FINDINGS OF FACT

This cause has come on before the Court on the motion of Defendant, W. R. Fairchild Construction Company, Ltd. (Fairchild), for summary judgment, upon the depositions taken in this cause and exhibits to the crossclaim of Fairchild against L & A Contracting Company, and it appears therefrom that there is no genuine issue of fact with respect to the part played by Fairchild in the erection of a new Popps Ferry Bridge to be constructed in Harrison County, Mississippi, and the demolition of the Old Popps Ferry Bridge. It appears from the contract that defendant L & A Contracting Company agreed to perform certain work on the new Popps Ferry Bridge, together with Fairchild, under a contract denominated a joint venture but the parties thereto were to perform their portions of the contract as independent contractors. Fairchild's portion of the contract was the driving of the piling furnished by defendant Gulf Coast Pre-Stress Company. After that pile driving was done, Fairchild had no further contact with the project. It had absolutely no contact with the removal of the Old Popps Ferry Bridge.

The Complaint and Amended Complaint state eight causes of action. The first cause of action is for negligence under the Jones Act. It is so basic as to need no citation that the Jones Act furnishes a cause of action to the injured employee against the employer only. It is uncontradicted that the plaintiff was not the employee of Fairchild.

The second cause of action is for unseaworthiness of the flotilla on which plaintiff was injured. It is uncontradicted that Fairchild did not own, lease, charter, man or control any of the vessels involved in the dismantling of the Popps Ferry Bridge.

The third cause of action charged negligence of Fairchild, realleging and repeating the allegations set forth in the first and second causes of action. In addition, it states that Fairchild breached its duty to supply the plaintiff a safe place in which to work and to supervise and inspect the working conditions of the defendant, L & A Contracting Company. There is no genuine issue of fact concerning the total absence of any participation by Fairchild in the dismantling of the Old Popps Ferry Bridge.

The fourth cause of action is against Gulf Coast Pre-Stress Company. It does not charge Fairchild with any act of omission or commission.

The fifth cause of action is against Moody Brothers of Jacksonville, Inc., and does not charge any act of omission or commission on the part of Fairchild.

The sixth cause of action is against Ray Sims, Sr. and does not charge Fairchild with any act of omission or commission.

The seventh cause of action is for maintenance and cure, and unpaid wages. This is a cause of action permitted by a maritime employee against his employer and as previously noted that relationship never existed between the plaintiff and Fairchild.

The amended suit charges in the seventh cause of action a claim against Brown Engineers, Inc. It is undisputed that Fairchild had no part in the demolition of the Popps Ferry Bridge and therefore the allegations which by inference charge Fairchild with negligence have no basis in fact.

The eighth cause of action restates a claim for maintenance, cure and unpaid wages, which charges have been discussed by the court above.

For the reasons assigned, it appears that there is no genuine issue of fact for the submission to any trier of fact with respect to any act of omission or commission on the part of Fairchild which led to the injury serving as the basis for plaintiff's suit and the judgment should be entered for Fairchild.

CONCLUSIONS OF LAW

I

The Court has jurisdiction of the parties and the subject matter.

II

Fairchild's counsel shall present a Judgment of Dismissal to this Court within the time permitted by the local rules:

(a) Granting Fairchild's Motion for Summary Judgment;

(b) Entering judgment for and on behalf of Fairchild and against Jack N. Seymour, Jr.;

(c) Dismissing the claim of Jack N. Seymour, Jr. against Fairchild with prejudice, the parties to bear their respective costs;

(d) Dismissing the crossclaim of Fairchild against L & A Contracting Company without prejudice.

This 3rd day of September, 1980.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF
MISSISSIPPI

JACK N. SEYMOUR, JR.

VS. CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC.

CONSOLIDATED WITH

IN THE MATTER OF: CIVIL ACTION NO. S80-0350(N)

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CMS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY

FILED
SEP 3 [illegible]

JUDGMENT OF DISMISSAL

This cause coming on this day to be heard on motion of W. R. Fairchild Construction Company, Ltd. for summary judgment, and upon documentary evidence, it appears to the Court that said motion should be sustained, it is, therefore,

ORDERED, that the motion of W. R. Fairchild Construction Company, Ltd., for summary judgment, be and the same is hereby sustained as to the claim of the Plaintiff Jack N. Seymour, Jr., and it is further

ORDERED, that judgment for and on behalf of W. R. Fairchild Construction Company, Ltd. is hereby entered in its behalf and against Jack N. Seymour, Jr., and it is further

ORDERED, that the claim of Jack N. Seymour, Jr. against W. R. Fairchild Construction Company, Ltd. be and the same is hereby dismissed with prejudice, the parties to bear their respective costs, and it is finally

ORDERED, that the crossclaim of W. R. Fairchild Construction Company, Ltd. against L & A Contracting Company be

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and the same is hereby dismissed without prejudice.

ORDERED, this 3rd day of September, 1980.

Walter L Nixon Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI

JACK N. SEYMOUR, JR.

VS. CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC.

CONSOLIDATED WITH

IN THE MATTER OF: CIVIL ACTION NO. S80-0359(N)

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CMB 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY

FILED
SEP 3 - 1980
CLERK
DEPUTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER FRCP 52

FINDINGS OF FACT

This cause has come on before the Court on the motion of Defendant, W. R. Fairchild Construction Company, Ltd. (Fairchild), for summary judgment, upon the depositions taken in this cause and exhibits to the crossclaim of Fairchild against L & A Contracting Company, and it appears therefrom that there is no genuine issue of fact with respect to the part played by Fairchild in the erection of a new Poppe Ferry Bridge to be constructed in Harrison County, Mississippi, and the demolition of the Old Poppe Ferry Bridge. It appears from the contract that defendant L & A Contracting Company agreed to perform certain work on the new Poppe Ferry Bridge, together with Fairchild, under a contract denominated a joint venture but the parties thereto were to perform their portions of the contract as independent contractors. Fairchild's portion of the contract was the driving of the piling furnished by defendant Gulf Coast Pre-Stress Company. After that pile driving was done, Fairchild had no further contact with the project. It had absolutely no contact with the removal of the Old Popps Ferry Bridge.

The Complaint and Amended Complaint state eight causes of action. The first cause of action is for negligence under the Jones Act. It is so basic as to need no citation that the Jones Act furnishes a cause of action to the injured employee against the employer only. It is uncontradicted that the plaintiff was not the employee of Fairchild.

The second cause of action is for unseaworthiness of the flotilla on which plaintiff was injured. It is uncontradicted that Fairchild did not own, lease, charter, man or control any of the vessels involved in the dismantling of the Popps Ferry Bridge.

The third cause of action charged negligence of Fairchild, realleging and repeating the allegations set forth in the first and second causes of action. In addition, it states that Fairchild breached its duty to supply the plaintiff a safe place in which to work and to supervise and inspect the working conditions of the defendant, L & A Contracting Company. There is no genuine issue of fact concerning the total absence of any participation by Fairchild in the dismantling of the Old Popps Ferry Bridge.

The fourth cause of action is against Gulf Coast Pre-Stress Company. It does not charge Fairchild with any act of omission or commission.

The fifth cause of action is against Moody Brothers of Jacksonville, Inc., and does not charge any act of omission or commission on the part of Fairchild.

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The seventh cause of action is for maintenance and cure, and unpaid wages. This is a cause of action permitted by a maritime employee against his employer and as previously noted that relationship never existed between the plaintiff and Fairchild.

The amended suit charges in the seventh cause of action a claim against Brown Engineers, Inc. It is undisputed that Fairchild had no part in the demolition of the Popps Ferry Bridge and therefore the allegations which by inference charge Fairchild with negligence have no basis in fact.

The eighth cause of action restates a claim for maintenance, cure and unpaid wages, which charges have been discussed by the court above.

For the reasons assigned, it appears that there is no genuine issue of fact for the submission to any trier of fact with respect to any act of omission or commission on the part of Fairchild which led to the injury serving as the basis for plaintiff's suit and the judgment should be entered for Fairchild.

CONCLUSIONS OF LAW

I

The Court has jurisdiction of the parties and the subject matter.

II

Fairchild's counsel shall present a Judgment of Dismissal to this Court within the time permitted by the local rules:

(a) Granting Fairchild's Motion for Summary Judgment;

(b) Entering judgment for and on behalf of Fairchild and against Jack N. Seymour, Jr.;

(c) Dismissing the claim of Jack N. Seymour, Jr. against Fairchild with prejudice, the parties to bear their respective costs;

(d) Dismissing the crossclaim of Fairchild against L & A Contracting Company without prejudice.

This 3d day of September, 1980.

UNITED STATES DISTRICT JUDGE

STYLE OF CASE: **DIVISION:**

CIVIL ACTION NO. S80-0274(N)
Jack W. Seymour, Jr.
v.
L & A Contracting Co., et al

CIVIL ACTION NO. S80-0339(N)
Jack W. Seymour, Jr.
v.
L & A Contracting Co., et al

APPEARANCES:
FOR PLAINTIFF(S):

Joe Sam Owen
P.O. Box 673
Gulfport, MS 39501

FOR DEFENDANT(S):

Paul J. Delcambre
P.O. Drawer 289
Biloxi, MS 39533

George E. Morse
P.O. Drawer 100
Gulfport, MS 39

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
DEC 1 1980
[illegible] CLERK
BY DEPUTY

HEARING ON / X / 1. Motion of Brown Engineers, Inc. for Summary Judgment
2. Motion of W.R. Fairchild Construction Co. for Summary Judgment

PRE-TRIAL: Hours Minutes **X MOTION:** Hours 30 Minutes

TRIAL: COURT / / Hrs. Mins. JURY / / Hrs. Mins.

ISSUE JOINED: 7/14/80

PLACE OF HOLDING COURT: Biloxi, MS
JUDGE(S) PRESIDING: Honorable Walter L. Nixon, Jr.
COURT REPORTER:
DATE(S): November 26, 1980

ACTION TAKEN:

1. Denied.
2. Denied.

Motion to file cross-claim to be filed by W.R. Fairchild Construction Co.

R. Capuano
DEPUTY CLERK

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
DEC 1 1980
HARVEY G. HENDERSON, CLERK
DEPUTY
BY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT
OF MISSISSIPPI

JACK N. SEYMOUR, JR.,

VERSUS

CIVIL ACTION NO. S80-0274(R)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR. AND BROWN
ENGINEERS, INC.,

CONSOLIDATED WITH

IN THE MATTER OF:

CIVIL ACTION NO. S80-0259(R)

L & A CONTRACTING COMPANY
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
EXONERATION FROM OR LIMITATION
OF LIABILITY

ORDER

On Motion for Summary Judgment by Brown Engineers, Inc. against Jack N. Seymour, Jr. and on briefs and argument of counsel, the Court finds that the Motion should be denied. It is therefore,

ORDERED AND ADJUDGED that the Motion for Summary Judgment by Brown Engineers, Inc. against Jack N. Seymour, Jr. be and the same is denied.

SO ORDERED this the 1st day of December, 1980.

s/ Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY.
HARVEY G. HENDERSON, CLERK
BY:
Deputy Clerk

EXHIBIT 4 (c)

SOUTHERN DISTRICT
FILED
DEC 4 1980
HARVEY G. HENDERSON, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR. — PLAINTIFF

VERSUS — CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY
W.R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC. — DEFENDANTS

CONSOLIDATED WITH:

IN THE MATTER OF:

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS,
COMPANY AND MOODY BROTHERS OF
JACKSONVILLE, INC., AS OWNERS/
OPERATORS OF THE M/V SWITCHER
II, BARGE MOBRO 905 AND BARGE
CMS 110, PRAYING FOR EXONERATION
FROM OR LIMITATION OF LIABILITY — CIVIL ACTION NO. S80-0359(N)

ORDER OVERRULING MOTION OF W.R. FAIRCHILD CONSTRUCTION COMPANY, LTD., FOR SUMMARY JUDGMENT ON THE CROSS-CLAIM OF BROWN ENGINEERS, INC.

On Motion for Summary Judgment by Defendant W.R. Fairchild Construction Company, Ltd., on the Cross-Claim filed against the Movant by Defendant Brown Engineers, Inc., and on briefs and argument of counsel, the Court finds that there exists a material issue of fact and the Motion should be denied. It is therefore,

ORDERED AND ADJUDGED that the Motion for Summary Judgment by W.R. Fairchild Construction Company, Ltd., on the Cross-Claim of Brown Eningeers, Inc., be and the same is hereby denied.

SO ORDERED, this the 1st day of December, 1980.

s/ Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY.
HARVEY G. HENDERSON, CLERK
BY:
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR. **PLAINTIFF**

VS. **CIVIL ACTION NO. S80-0274(N)**

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC., **DEFENDANTS**

CONSOLIDATED WITH:

IN THE MATTER OF:

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS
COMPANY AND MOODY BROTHERS OF
JACKSONVILLE, INC., AS OWNERS/
OPERATORS OF THE M/V SWITCHER
II, BARGE MOBRO 905 AND BARGE
CMS 110, PRAYING FOR EXONERATION
FROM OR LIMITATION OF LIABILITY

SOUTHERN DISTRICT OF [illegible]
FILED
JAN 26 1981
[illegible] CLERK
BY

CIVIL ACTION NO. S80-0359(N)

NOTICE

TO:

Joe Sam Owen
Attorney at Law
P. O. Box 673
Gulfport, MS 39501

Eldon Bolton, Jr.
Attorney at Law
P. O. Box 4077
Gulfport, MS 39501

James K. Carroll
Attorney at Law
934 One Shell Square
New Orleans, LA 70139

Paul J. Delcambre, Jr.
P. O. Drawer 289
Biloxi, MS 39533

Bobby O'Barr
Attorney at Law
P. O. Box 541
Biloxi, MS 39533

Please take notice that the original attached Motion for Leave to File Crossclaim has this day been mailed to the Clerk for filing, and that the same will be called up before Hon. Walter Nixon, Jr., United States District Judge, in his chambers, Post Office Building, Biloxi, Mississippi, at 9:30 a.m., on February 3, 1981, or at such other time as may be convenient with the court.

WHITE & MORSE

BY:________________________

CERTIFICATE

I, George E. Morse, of counsel for W. R. Fairchild Construction Company, Ltd., in the above styled cause, hereby certify that I have this day mailed a true copy of the foregoing Notice with the attached motion to the above named attorneys at the addresses shown.

This 23rd day of January, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR. PLAINTIFF

VS. CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC. DEFENDANTS

CONSOLIDATED WITH:

IN THE MATTER OF:

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF
THE M/V SWITCHER II, BARGE MODRO
905 AND BARGE CMS 110, PRAYING
FOR EXONERATION FROM OR LIMITATION OF
LIABILITY CIVIL ACTION NO. S80-0350(N)

MOTION FOR LEAVE TO FILE CROSSCLAIM

Now comes W. R. Fairchild Construction Company, Ltd. (Fairchild), and moves the Court for leave to file a Crossclaim against L & A Contracting Company in the form and particulars set out in a copy of said Crossclaim annexed hereto and made a part hereof and for grounds refer the Court to the matters and facts set out in the proposed Crossclaim.

Respectfully submitted,
WHITE & MORSE
BY:____________________

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT
OF MISSISSIPPI

JACK N. SEYMOUR, JR.,

VS. CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR. AND BROWN
ENGINEERS, INC.

CONSOLIDATED WITH

IN THE MATTER OF: CIVIL ACTION NO. S80-0359(N)

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE,
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CMS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY

CROSSCLAIM

Now comes W. R. Fairchild Construction Company, Ltd. (Fairchild) and with leave of court obtained files this its Crossclaim against L & A Contracting Company (L&A):

I

Fairchild is a partnership having its principal place of business in Hattiesburg, Mississippi. L & A is a Mississippi corporation organized and existing under the laws of the State of Mississippi.

II

On December 6, 1976, L&A and Fairchild entered into a Joint Venture Agreement, a copy of which is annexed to this Crossclaim, marked Exhibit "A" and prayed to be a part hereof. The parties agreed in said Joint Venture Agreement that in the performance of the work contemplated in the contract, each entity would be an independent contractor. In Paragraph (7) thereof the parties agreed to indemnify, protect and save the other harmless from any and all claims, suits or liabilities for injuries to property and person, and for further indemnity as set out in said Paragraph (7).

III

Fairchild charges that in the dismantling of the Old Popps' Ferry Bridge, work was being performed solely by the employees and officers and agents of L&A; that each of said employees was under the control of L&A and not under the control of Fairchild; that the method and manner of performance of the contract for the dismantling of the bridge was solely under the control and direction of L&A and not under the control and direction of Fairchild.

IV

If Fairchild is made to respond in damages to Brown Engineers, Inc. under its crossclaim against Fairchild, or for any costs of the defense incurred by Brown Engineers, Inc., or because of any other liability to Brown Engineers, Inc., Fairchild is entitled to full and complete indemnity over and against L&A for all of said damages, costs, or other expenses and all of its costs and its attorneys fees incurred in the defense of the crossclaim of Brown Engineers, Inc.

WHEREFORE, Fairchild brings this its Crossclaim against L&A, and demands judgment over against L&A indemnifying Fairchild for all of its damages, costs and expenses it is required to pay to Brown Engineers, Inc., and all of Fairchild's costs, including attorneys fees in the defense of said crossclaim.

Respectfully submitted,

WHITE & MORSE
Attorneys for W. R. Fairchild
Construction Company, Ltd.

BY: ____________________________

CERTIFICATE OF SERVICE

I, George E. Morse, of counsel for W. R. Fairchild Construction Company, Ltd., in the above styled cause, hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing Crossclaim to Mr. Joe Sam Owen, P. O. Box 673, Gulfport, MS 39501, Mr. Bobby O'Barr, P. O. Box 341, Biloxi, MS 39533, Mr. Paul J. Delcambre, Jr., P. O. Drawer 289, Biloxi, MS 39533, Mr. Eldon Bolton, Jr., P. O. Box 4077, Gulfport, MS 39501, and Mr. James K. Carroll, 934 One Shell Square, New Orleans, LA 70139.

This ____ day of ______________, 1981.

____

[illegible] AGREEMENT

[illegible], by and between

[illegible] Mississippi corporation, with

[illegible] Mississippi, hereinafter referred to

[illegible] Construction Company, Ltd.

[illegible] Mississippi

hereinafter [illegible] "Fairchild".

[illegible]

[illegible] "[illegible]"

[illegible] Harrison County

[illegible] County, [illegible] ("The

[illegible]"); and

[illegible], and

[illegible] with

[illegible]

[illegible] and

[illegible]

[illegible]

[illegible]

[illegible]

The parties hereto hereby agree as follows:

1. [illegible]

[illegible] following [illegible]

[illegible]

[illegible]

[illegible] NUMBER	QUANTITY		ITEM
201-[illegible]	Lump Sum	L.S.	Clearing and Grubbing
[illegible]-A	[illegible]	L.S.	[illegible] of Existing Bridge Superstructure & Substructure
[illegible]-202-B	[illegible]	L.S.	Removal [illegible] Fenders
[illegible]-202-C	[illegible]	L.S.	[illegible] Operator's House
[illegible]-A	[illegible]	C/Y	Unclassified Excavation (FM)
[illegible]	[illegible]	C/Y	Borrow Excavation (CP)(LVM)
[illegible]	[illegible]	[illegible]	[illegible] In-Grade Preparation
[illegible]-1	[illegible]	Ton	[illegible]" Plant Mix Bituminous Base Course, Type 1
[illegible]	[illegible]	Ton	[illegible]" Hot Bituminous Pavement [illegible] Course, Type 1
[illegible]	[illegible]	[illegible]	1[illegible]" Reinforced Concrete Pipe, [illegible]
[illegible]	[illegible]	[illegible]	[illegible]" Reinforced Concrete Flared End Section
[illegible]	195.0	L/F	6" Vit. Clay San. Sewer Pipe, Rubber Gasket Jt. Std. Str.
[illegible]	1	Unit	Sanitary Sewer Manhole
[illegible]-A	1[illegible]	Each	R.C.S. [illegible], Type [illegible]
[illegible]	[illegible]	L.S.	Maintenance of Traffic
[illegible]	[illegible]	L.S.	Engineer's Field Office
[illegible]	[illegible]	L/F	Beam Type Guard Rail
[illegible]19-[illegible]	[illegible].062	Mile	Traffic Stripe (Skip White)
[illegible]	[illegible].50[illegible]	Mile	Traffic Stripe (Cont. White)
619-	[illegible].09	Mile	Traffic Stripe (Cont. Yellow)
[illegible]-B	[illegible]	S/Y	Standard Ground Preparation Type [illegible]
[illegible]-A	[illegible]	Ton	Agricultural Limestone
650-B	0.5	Ton	Commercial Fertilizer ([illegible])
[illegible]	0.25	Ton	Ammonium Nitrate
[illegible]-A	1[illegible].0	Lb.	Seeding (Common Bermuda)
[illegible]-A	40.0	Lb.	Seeding (Bahia Grass)
[illegible]9-A	[illegible].0	Ton	Vegetative Material for Mulch Type I

PAY ITEM NUMBER	APPROX. QUANTITY	UNIT	ITEM
659-B	150.0	Gal.	Bituminous Material for Mulch
634	103.0	S/Y	Solid Sodding
804-AA	870.[illegible]	C/Y	Class "AA" Bridge Concrete
804-B	[illegible],865.0	C/Y	Class "B" Bridge Concrete
804-T	12,[illegible].0	L/F	50 Ft. Prestressed Concrete Bea Type III
804-T	[illegible],211.75	L/F	90 Ft. Prestressed Concrete Bea Type IV
805	1,357,[illegible]13.0	Lb.	Reinforcement
810-B	Lump Sum	L.S.	Steel Superstructure
812-A	6,[illegible]62.0	S/F	Steel Grid Floor (5"Open Type)
812-B	1,755.0	S/F	Steel Grid Floor(5" Concrete Fi
812-B	1,[illegible]45.0	S/F	Steel Grid Floor (2" Conc.Fille
813-A	7,181.0	L/F	Concrete Railing
813-E	380.0	L/F	Steel Roadway Railing
813-L	4,910.0	L/F	Aluminum Sidewalk Railing
813-K	564.0	L/F	Steel Pipe Railing
SP-821	Lump Sum	L.S.	Operators House
SP-824	[illegible]60.[illegible]	C/Y	Concrete Counterweight
SP-825	357,230.0	Lb.	Counterweight Billets
SP-826	Lump Sum	L.S.	Operating Machinery
SP-827	Lump Sum	L.S.	Electrical Work
820-A	22.000	M.B.M.	Treated Timber

Fairchild will perform or be responsible for performance of the following other items of work called for under the Contract, and shall be entitled to receive and retain all payments from the Owner on account of the performance of said items of work, at the unit prices indicated herein:

PAY ITEM NUMBER	APPROX. QUANTITY	UNIT	ITEM	UNIT PRICE
L & A ONLY:				
SP-801-A	[illegible]	Each	Test Piles, 18" x 18" Prestressed Concrete	5,500.00
SP-804-A	[illegible]	Each	Test Piles, 24" x 24" Prestressed Concrete	9,500.00
SP-801-A1	[illegible]	Each	Redriving Piles, 18" x 18" Prestressed Concrete	500.00
SP-804-A1		Each	Redriving Piles, 24" x 24" Prestressed Concrete	500.00
SP-801-B	4	Each	Loading Test, 18" x 18" Prestressed Concrete	4,600.00
SP-804-B	2	Each	Loading Test, 24" x 24" Prestressed Concrete	4,500.00
SP-801-B1	[illegible]	Each	Reloading Test, 18" x 18" Prestressed Concrete	500.00
SP-804-B1		[illegible]	Reloading Test, 24" x 24" Prestressed Concrete	500.00
801-F	21,[illegible]	LF	Prestressed Concrete Piling 18" x 18"	9.40
804-F	15,41[illegible]	LF	Prestressed Concrete Piling 24" x 24"	14.55
[illegible] ONLY:				
804-[illegible]	19,[illegible]	[illegible]	Treated Timber Piles	6.75

L & A shall further undertake to comply with all requirements for traffic control and protection of the traveling public. This shall include provision of all signs, markers and other traffic control and safety devices, and signals.

L & A and Fairchild agree, each with the other, to separately perform its assigned portion of the Contract and all work incident thereto, using its own materials, labor, supervision, machinery, equipment, tools, supplies, and sub contractors in strict accordance with the terms and conditions of the contract, including all the general and special conditions, plans, specifications, and other documents forming or by reference made a part thereof, all of which shall by reference be considered a part of the Contract.

Each of the [illegible] full and complete responsibility for completing its portion satisfactorily and on time, all in accordance with said contract and specifications; neither shall be liable to the other for damages for any failure of the other to perform and complete its work; furthermore, each will be responsible for all sales, use or excise taxes relating to its portion of the work to be performed and will carry their own insurance. [illegible] will pay the premium on the bond required by the Owner.

2. Independent Contractor: L & A and [illegible] agree, each with the other, that each will be an independent contractor in the performance of its assigned portion of the work.

3. Liquidated Damages: Any and all liquidated and other damages which may be assessed against the Joint Venture by reason of acts or omissions of one of the parties, including but not limited to acts or omissions resulting in the failure of said party to complete its assigned portion of the contract within the time set forth in the project schedule, shall be paid by such party; and such party shall indemnify the other against any loss, damage or liability by reason of the assessment of such damages. The payment of such damages shall not release such party from its obligation to fully perform its commitments hereunder and to pay all damages the Joint Venture may sustain by reason of the failure of such party to so perform.

4. Disputes: All disputes and disagreements between the Parties pertaining to this Joint Venture which cannot be resolved by mutual agreement shall be submitted for arbitration to three (3) arbitrators. One arbitrator will be selected by each party to this Agreement [illegible] and the third arbitrator will be selected by these first two arbitrators picked. The arbitrators shall hear such dispute within [illegible] days following the date of submission,

and shall render their majority decision within [illegible] days after the conclusion of such hearing. The arbitrator's decision as to each and every dispute and disagreement shall be final and binding on all Parties and may be enforceable in any court of record having jurisdiction over one or more of the Parties. The Rules of Commercial Arbitration of the American Arbitration Association shall determine the conduct of all arbitration proceedings hereunder.

5. Retainage: In the event the Owner retains any monies due unto the parties hereto, each party shall be entitled to receive its appropriate share and percentage of such retention, and any interest payments accruing thereto, as relates to its performance of work under the Contract.

6. Handling of Funds. The parties to this Joint Venture hereby authorize L & A to endorse checks from the Owner in the name of the venture and make appropriate payments to Fairchild and/or others thereafter in distribution of the funds received.

7. Insurance and Indemnity. L & A and Fairchild shall each provide and maintain compensation for the protection of its employees, as required by law of an employer and as will protect it from loss or damage because of personal injuries including death, to its employees, or any of them; and procure public liability and property damage insurance as follows:

R.S.

Public Liability ~~[illegible]~~
~~[illegible]~~ Bodily Injury/Property Damage
$1,000,000/$500,000
A.

Automobile Public Liability:
Bodily Injury/ Property Damage
$250,000/$500,000

L & A and Fairchild each specifically obligates itself to indemnify, protect, and save the other harmless from any and all claims, suits or liabilities for injuries to property, injuries to persons, including death, and from any other claims, suits or liability arising out of the performance of its portion of the work, or in any way occasioned by any act or omission of such party or any of its officers, agents, employees, or servants or any subcontractor or other person directly or indirectly employed by it. All of the insurance policies as herein before provided under this section ~~[illegible]~~ shall serve to indemnify and protect the Joint Venture and save it harmless from all claims, suits or liabilities as set forth herein.

All of said certificates shall set forth on the face thereof contractual coverage as required herein. No amendment or cancellation of any of said policies shall be effective until after thirty (30) days' notice in writing to all parties to this agreement.

L & A and Fairchild further each severally obligates itself: (a) To indemnify the other against and save harmless from any and all claims, suits, liability, expense or damage for any alleged or actual infringement or violation of any patent or patent right, arising in connection with the Contract and anything done thereunder; (b) To pay for all materials furnished and work and labor performed under the Contract, and to indemnify the other and the Owner against and save them and the premises harmless from any and all claims, suits, or liens therefore, by others; and (c) To obtain and pay for all permits, licenses, and official inspections made necessary by its work and conduct thereof. Each also warrants and guarantees to the other its work and materials and agreed to make good, at its own expense, any defect in materials or workmanship which may occur or develop prior to the Joint Venture's release from responsibility to the Owner thereunder. L & A and Fairchild each assumes toward the Joint Venture all the obligations and responsibilities that the Joint Venture assumes toward the Owner, as set forth in the Contract, General and Special Conditions, Drawings, Specifications and other Documents hereinabove referred to, with respect to such portion of the work to be performed by the respective parties hereto.

Each [illegible] shall each severally indemnify the other and save harmless from any and all [illegible], damages, costs, expenses and attorney's fees suffered or incurred by reason of any breach of the agreements and covenants, and any other provisions or covenants of this Joint Venture Agreement.

8. Equal Employment Opportunity: Each of the Venturers agrees, each with the other, that as a condition of [illegible] the employment relationship, from initial recruitment through final lay-off or termination, it will not discriminate against any employee or applicant for employment because of race, creed, color, sex or national origin. Each shall comply with and be bound by all provisions of law, all executive orders, regulations, statutes, and agreements (including but not limited to the Civil Rights Act of 1964 and Executive Order 11246) to which its operations hereunder may from time to time be subject. Each further agrees that all provisions thereof which are required to apply to its portion of the Contract or work performed thereunder shall be included in and made a binding part of every subcontract and purchase order issued by him to the extent required by law.

9. Project Manager: Ray A. Sims shall be Project Manager to handle all correspondence and other such routine matters between the Owner and the Joint Venture; provided, however, the Project Manager shall obtain the written consent of each of the venturers prior to the execution of any written document affecting the contractual or otherwise legal rights of each other venturer with the Owner.

EXHIBIT 4 (d)

10. Assignment; [illegible]. Neither L & A nor Fairchild shall assign its rights or responsibilities hereunder without the written consent of the other, other than portions of the work which may be subcontracted to the extent permitted under the Contract.

11. This Agreement shall be deemed and construed a joint venture solely for the purpose of carrying out the Contract as provided herein and shall in no wise be construed to create a general partnership between the Parties, nor shall it be construed to authorize any Party, for or on behalf of any other Party or the Joint Venture:

A) To bid for or undertake any other contracts; or

B) To borrow money or otherwise pledge credit; or

C) To [illegible] or otherwise make or negotiate any contracts, commitments or undertakings.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their respective officers hereunto duly authorized and their respective seals affixed hereto, all as of the day and year first above written.

L & A CONTRACTING COMPANY

ATTEST:

V.Pres.
Title

W. H. FAIRCHILD CONSTRUCTION COMPANY, I

WITNESS:

Laurel Dunnall

Rodney Fairchild
Partner

TITLE OF CASE:
CIVIL ACTION NO. S80-0274(N)
Jack N. Seymour, Jr.
v.
L & A Contracting Co.,
et al

DIVISION:
CIVIL ACTION NO. S80-0359(N)
Jack N. Seymour, Jr.
v.
L & A Contracting Co.,
et al

Entered

SOUTHERN DISTRICT OF MISS.
FILED
MAY 5 - 1982
CLARENCE A. [illegible], CLERK
BY ___ DEP.

APPEARANCES:
FOR PLAINTIFF(S):

Joe Sam Owen

Bobby G. O'Barr

FOR DEFENDANT(S):

James Carroll

Eldon L. Bolton, Jr.

George E. Morse

Paul J. Delcambre

HEARING ON /___/

x PRE-TRIAL: Hours 30 Minutes MOTION: Hours Minutes

TRIAL: COURT /___/ Hrs. Mins. JURY /___/ Hrs. Mins.

ISSUE JOINED:

PLACE OF HOLDING COURT: Biloxi, MS
JUDGE(S) PRESIDING: Honorable Walter L. Nixon, Jr.
COURT REPORTER:
DATE(S): April 16, 1982

ACTION TAKEN:

Limitation and exoneration must be heard first. Answer in Jones Act case to be filed within 20 days. Counsel to explore settlement possibilities and report back to the Court.

DEPUTY CLERK

STYLE OF CASE:
CIVIL ACTION NO. S80-0274(N)
Jack N. Seymour, Jr.
v.
L & A Contracting Co.,
et al

DIVISION:
CIVIL ACTION NO. S80-0359(N)
Jack N. Seymour, Jr.
v.
L & A Contracting Co.,
et al

Entered

SOUTHERN DISTRICT OF MISS.
FILED
MAY 5 - 1982
CLARENCE A. PIERCE, CLERK
BY ______ DEPUTY

APPEARANCES:
FOR PLAINTIFF(S):

Joe Sam Owen

Bobby G. O'Barr

FOR DEFENDANT(S):

James Carroll

Eldon L. Bolton, Jr.

George E. Morse

Paul J. Delcambre

HEARING ON ☐

x PRE-TRIAL: Hours 30 Minutes

MOTION: Hours Minutes

TRIAL: COURT ☐ Hrs. Mins. JURY ☐ Hrs. Mins.

ISSUE JOINED:

PLACE OF HOLDING COURT: Biloxi, MS
JUDGE(S) PRESIDING: Honorable Walter L. Nixon, Jr.
COURT REPORTER:
DATE(S): April 16, 1982

ACTION TAKEN:

Limitation and exoneration must be heard first. Answer in Jones Act case to be filed within 20 days. Counsel to explore settlement possibilities and report back to the Court.

DEPUTY CLERK

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 1 1982
[illegible], CLERK
BY [illegible] DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

JACK N. SEYMOUR, JR.

VERSUS

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC.

CIVIL ACTION
NO. S80-0274(N)

CONSOLIDATED WITH:

L & A CONSTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MOBRO 905
AND BARGE CSS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY

CIVIL ACTION
NO. S80-0359(N)

STIPULATION AND MOTION FOR ENTRY OF JUDGMENT

Come now Jack N. Seymour, Jr., Plaintiff, and L & A Contracting Company (L & A), Gulf Coast Pre-Stress Company, Inc., (Gulf Coast), Moody Brothers of Jacksonville, Inc. (Moody), Ray Sims, Sr. (Sims), Brown Engineers, Inc. (Brown), and Wiley Fairchild, Herbert Fairchild, Rodney Fairchild and Charles D. Fairchild, general partners doing business as W. R. Fairchild Construction Company, Ltd. (Fairchild), Defendants (hereinafter collectively referred to as Defendants), by and through their respective attorneys of record and mutually agree by way of stipulation to a complete and final settlement of, and with respect to, this cause and any and all matters that are, or might have been, embraced herein, and for the entry of a Judgment in this cause upon the following terms and conditions, to-wit:

I.

That Jack N. Seymour, Jr. filed an action in the United States District Court against Defendants for damages under the Jones Act and under general maritime law, alleging negligence and/or unseaworthiness which caused an accident on or about September 25, 1979 aboard the Barge MOBRO 905, which accident resulted in injuries to Jack N. Seymour, Jr. The parties hereto stipulate that the Barge MOBRO 905 at the time of the accident was owned by Moody, and operated by L & A and Gulf Coast, and that at the time of the accident Jack N. Seymour, Jr. was an employee of L&A acting in the capacity of a member of the crew of the Barge MOBRO 905.

II.

That Brown and Fairchild answered the Complaint, denying any negligence and/or unseaworthiness of the vessel. That L&A, Gulf Coast and Moody petitioned this Honorable Court for exoneration from or limitation of liability. That discovery was undertaken by all parties which included the depositions of the Plaintiff, Jack N. Seymour, Jr., the L & A foreman, Charlie Riadle, the Executive Vice President of L & A, Sims, and a number of doctors. That after extensive interrogatories and Motions to Produce Documents were filed and answered, and after the vessel, Barge MOBRO 905 had been fully inspected and photographed by Plaintiff's counsel, all parties hereto are knowledgeable of all facts and circumstances surrounding the events leading to, and culminating in, the aforementioned accident and resulting injuries to the Plaintiff.

III.

That the Plaintiff herein was provided [illegible] in an amount in excess of $65,000.00 which included all [illegible] expenses incurred as a result of the aforementioned accident, said payments being provided until compromise [illegible]

IV.

That L&A without admitting any liability [illegible] the aforementioned accident and resulting injuries to [illegible] Plaintiff herein but in order to avoid further litigation, [illegible] expenses and possible judgment against it, has offered to [illegible] to the Plaintiff the sum and amount of $665,000.00, in [illegible] to the amount previously paid for cure, to settle all [illegible] against it. Such amount is to be in full and complete settlement for, and in satisfaction of, any claims that the said Jack N. Seymour, Jr. may have against L & A, Gulf Coast, Moody, Sims, Sr., Brown and Fairchild under the Jones Act, General Maritime Law and in settlement of any causes of action of any nature that has been brought, or might have been brought, or might be brought in the future against L & A, Gulf Coast, Moody, Sims, Brown and Fairchild for any damages of any nature arising out of the accident and injuries described above. That further, this compromise sum of $665,000.00 includes consideration for any claims the Plaintiff might have for any past, present or future maintenance and cure and that the said $665,000.00 is to be considered and construed as including a lump sum settlement of any and all past, present or future claims which the Plaintiff might have against L & A, Gulf Coast, Moody, Sims, Brown and Fairchild for maintenance and cure.

V.

That the Plaintiff, after being fully advised by his attorney, feels that the offer is just, fair and equitable and has agreed to accept such settlement offer.

VI.

That Judgment shall be entered in accordance with this Stipulation in favor of Jack N. Seymour, Jr., as against L & A in the aggregate sum and amount of $665,000.00 and that upon payment of such sum to the Plaintiff herein L & A, Gulf Coast, Moody, Sims, Brown and Fairchild, and their corporate successors, if any, and their general or limited partners, if any, shall be fully, finally and completely released from any claims of whatever nature which may have or might have been brought by the Plaintiff against such Defendants, or which may have been brought in the future, and that L & A, Gulf Coast, Moody, Sims, Brown and Fairchild, their corporate successors, if any, and their general and limited partners, if any, shall be fully and finally discharged from any liability whatsoever for any damages of any kind or nature arising out of the accident of September 25, 1979 or for past or future maintenance and cure.

WHEREFORE, the parties hereto upon stipulating and agreeing as set forth hereinabove do move this Court to enter, without further notice herein, a final judgment in this cause in full conformity with this Stipulation and Agreement for the sum and amount of $665,000.00 for the negligence and/or unseaworthiness claim, as well as for past and future maintenance and cure, and upon payment thereof, to forever bar any of the parties hereto from ever again asserting against one another any claim or causes of action of any nature which are or might have been embraced in this cause or which may be brought in the future, each party to bear its own costs.

Respectfully submitted this ___ day of ____________, 1982.

JACK N. SEYMOUR, JR.

BY: ______________________
JOE SAM OWEN

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE, INC.,
RAY SIMS, SR.

BY: ______________________
ELDON L. BOLTON, JR.

W. R. FAIRCHILD CONSTRUCTION
COMPANY LTD

BY: ______________________
GEORGE E. MORSE

BROWN ENGINEERS, INC.

BY: ______________________

FILED

MAY 19 1982

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

JACK N. SEYMOUR, JR.	
VERSUS	**CIVIL ACTION NO. S80-0274(N)**
L & A CONTRACTING COMPANY, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD., GULF COAST PRE-STRESS COMPANY, INC., MOODY BROTHERS OF JACKSONVILLE, INC., RAY SIMS, SR., AND BROWN ENGINEERS, INC.	
CONSOLIDATED WITH:	
L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY AND MOODY BROTHERS OF JACKSONVILLE INC., AS OWNERS/OPERATORS OF THE M/V SWITCHER II, BARGE MOBRO 905 AND BARGE CMS 110, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY	**CIVIL ACTION NO. S80-0359(N)**

JUDGMENT

The parties hereto having come before this Court on Stipulation and Motion for Entry of Judgment, and this Court having examined such stipulation and having examined the Plaintiff and his counsel in open Court concerning the facts and circumstances surrounding the accident and resulting injuries giving rise to this action and being satisfied that the facts were fairly presented, does find as follows, to-wit:

I.

That Jack N. Seymour, Jr. Plaintiff, on or about September 25, 1979 was employed by L & A Contracting Company as a member of the crew and in the capacity as a seaman aboard the Barge MOBRO 905 which at the time was owned by Moody Brothers of Jacksonville, Inc., and operated by L&A Contracting Company and Gulf Coast Pre-Stress Company, Inc. That on such date Jack N. Seymour, Jr. was struck by a concrete slab while working on the deck of the Barge MOBRO 905 and was [illegible].

18/1982
Pages 1852-1855

injuring his pelvic area, right leg and associated parts of his anatomy. That such injury consisted of a pelvic fracture, traumatic rupture of the urinary bladder, traumatic transection of the prostatomembraneous urethra, which required surgery and possible severe nerve damage to peripheral nerves supplying the right pelvic area.

II.

This Court further finds that the Plaintiff incurred medical expenses in an amount in excess of $65,000.00 all of which has been paid by L & A Contracting Company.

III.

That suit was filed by Jack N. Seymour, Jr. against L & A Contracting Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., Brown Engineers, Inc. and (an entity incorrectly identified in [illegible] pleadings as W. R. Fairchild Construction which is in fa[illegible] general partnership consisting of Wiley Fairchild, Herbert Fairchild, Rodney Fairchild and Charles D. Fairchild, General Partners doing business as W. R. Fairchild Construction Company, Ltd., hereinafter sometime referred to as "Fairchild"), and such Defendants either filed an Answer hereto denying any negligence and/or unseaworthiness of the vessel which caused or contributed to the accident and resulting injuries, or filed a petition seeking exoneration from or limitation of liability. That in order to avoid further litigation and expenses and to avoid the possibility of a Judgment being rendered against it, L & A Contracting Company has offered to the Plaintiff the sum and amount of $665,000.00 in full, final and complete settlement of any and all claims which Jack N. Seymour, Jr. may have against anyone arising out of the accident and resulting injuries. This lump sum settlement includes consideration for any past or future maintenance and cure claims which the Plaintiff may have or which may arise as a result of the above described accident.

IV.

This Court further finds that after interrogating the Plaintiff and his counsel, that both are aware of all of the facts and circumstances leading up to and culminated in the above described accident. That with such knowledge and understanding, both Plaintiff and his counsel have agreed that such offer is just, fair and equitable and that the same should be accepted in full, final and complete settlement of any claims of any nature, including claims for maintenance and cure, which the Plaintiff may have against L & A Contracting Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., Brown Engineers, Inc. and Fairchild, or their corporate successors, if any, for damages arising out of the aforementioned accident.

V.

This Court further finds that under the facts and circumstances that the settlement of $665,000.00 for any and all claims which the Plaintiff may have under the Jones Act, under general maritime law or any other claims or causes of action the Plaintiff may now have or which may arise in the future including any claims for past or future maintenance and cure, should be approved by this Court. It is therefore,

ORDERED AND ADJUDGED that Judgment be entered for the Plaintiff against L & A Contracting Company for the sum and amount of $665,000.00. That upon payment of such judgment, L & A Contracting Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., Brown Engineers, Inc. and Fairchild shall be fully, finally and completely released and discharged from any and all liability of any kind or nature for damages arising out of the accident of September 25, 1979 aboard the Barge MOBRO 905 wherein the Plaintiff was injured. Further upon payment of such judgment, L & A Contracting Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., Brown

Engineers, Inc. and Fairchild shall be fully and finally released and discharged from any obligation to Jack N. Seymour, Jr. for past or future maintenance and cure of any kind, such claims being hereby extinguished by the lump sum settlement. That upon receipt of the $665,000.00 Jack N. Seymour, Jr. is hereby authorized and directed to execute any and all documents necessary to accomplish such full and final discharge of all parties hereto, and that each party is to bear their respective costs.

It is further ORDERED, that the Crossclaim of Brown Engineers, Inc. against W. R. Fairchild Construction Company, Ltd. be and the same is hereby dismissed with prejudice, the parties to bear their respective costs.

ORDERED AND ADJUDGED, this the 18th day of May, 1982.

Walter L Nixon Jr.
UNITED STATES MAGISTRATE
DISTRICT JUDGE

FILED
MAY 18 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACK N. SEYMOUR, JR.	*	CIVIL ACTION
VERSUS	*	NO. S80-0274(N)
L & A CONTRACTING COMPANY, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD, GULF COAST PRE-STRESS COMPANY, INC., MOODY BROTHERS OF JACKSONVILLE, INC., RAY SIMS, SR., AND BROWN ENGINEERS, INC.	*	
CONSOLIDATED WITH:	*	
L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY AND MOODY BROTHERS OF JACKSONVILLE INC., AS OWNERS/OPERATORS OF THE M/V SWITCHER II, BARGE MORRO 905 AND BARGE CMS 110, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY	*	CIVIL ACTION NO. S80-0359(N)

* * * * * * * * * * * *

SATISFACTION OF JUDGMENT

I, Joe Sam Owen, Attorney of Record for Jack N. Seymour, Jr., do hereby acknowledge that the Judgment entered in the above cause on the 18th day of May, 1982 has been fully paid and satisfied. I hereby appoint Verta Lee Swetman, Clerk of the United States District Court for the Southern District of Mississippi, Southern Division, as my Attorney-In-Fact to enter into any Judgment Records this document or any other notation necessary to show full payment and satisfaction of such judgment.

WITNESS MY SIGNATURE this the 18th day of [illegible], 1982.

JOE SAM OWEN, Attorney for Plaintiff,
Jack N. Seymour, Jr.

Jack N. Seymour, Jr.
vs.
L & A Contracting Company, et al
Consolidated with:
L & A Contracting Company, et al

CIVIL ACTION NO. S80-0274(N)
Civil Action No. [illegible]

FILED
NOV [illegible] 1982
[illegible] Clerk

STATE OF MISSISSIPPI

COUNTY OF HARRISON

RECEIPT AND RELEASE

WHEREAS, Jack N. Seymour, Jr. was employed by L & A Contracting Company on and prior to September 25, 1979; and

WHEREAS, the Plaintiff alleges that on or about September 25, 1979, he was severely injured on board the Barge MOBRO-905, while working as a member of the crew aboard said vessel, and while carrying out his proper duties and function as a member of the crew, which injuries consisted of but are not limited to injuries to the pelvic area; and

WHEREAS, the said Jack N. Seymour, Jr. has made claim against L & A Contracting Company, Gulf Coast Pre-Stress Company Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., Brown Engineers, Inc. and Wiley Fairchild, Herbert Fairchild, Rodney Fairchild and Charles D. Fairchild, general partners doing business as W. H. Fairchild Construction Company, Ltd., alleging that his injuries and disabilities as aforesaid were caused by the negligence and/or the unseaworthy condition existing aboard said vessel, liability for which has been denied; and

WHEREAS, in furtherance of his claim as aforesaid the said Jack N. Seymour, Jr. has instituted a suit in the United States District Court for the Southern District of Mississippi, Southern Division, entitled, "JACK N. SEYMOUR, JR. VERSUS L & A CONTRACTING COMPANY, W. H. FAIRCHILD CONSTRUCTION COMPANY, LTD., GULF COAST PRE-STRESS COMPANY, INC., MOODY BROTHERS OF JACKSONVILLE, INC., RAY SIMS, SR., AND BROWN ENGINEERS, INC., CONSOLIDATED WITH: L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY AND MOODY BROTHERS OF JACKSONVILLE, INC., AS OWNERS/OPERATORS OF THE M/V SWITCHER II, BARGE MOBRO 905 AND BARGE CBS 110, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY", bearing Cause No. S80-0274(N) consolidated with Cause No. S80-0336(N); and

WHEREAS, the parties desire to amicably settle and adjust their differences on the basis hereinafter set out;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, tha for and in consideration of the full sum of Six Hundred Sixty Five Thousand and No/100 Dollars ($665,000.00), cash in hand pa by L & A Contracting Company, receipt of which is hereby acknowledged, and due acquittance and discharge therefore granted; th said Jack M. Seymour, Jr. does hereby release, remise and forever discharge L & A Contracting Company, Gulf Coast Pre-Str Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., Brown Engineers, Inc. and Wiley Fairchild, Herbert Fairchil Rodney Fairchild and Charles D. Fairchild, general partners doing business as W. R. Fairchild Construction Company, Ltd., as any subsidiary companies and affiliated companies thereof, including their agents, servants, employees, officers, managing agents, underwriters, successors and assigns, general and limite partners, the Barge [illegible]-905, of and from any and all rights, claims, causes of action, liens or remedies of whatever kind or nature which he now has or which his heirs, assigns, or legal representatives may hereafter acquire for damages or expense, arising out of his employment with L & A Contracting Company as aforementioned, including but without limitation, any rights or claims based upon any claim for unseaworthiness of the vessel hereinabove mentioned, or its master or crew, for wages, maintenance and cure, or under any compensation by statute, Federal or State, or any contract or policy of insurance and whether at law, in equity or in admiralty, and whether the same be now known or hereafter discovered.

In further consideration of the foregoing payment, the said Jack M. Seymour, Jr. hereby agrees, and by the execution of this Receipt and Release, directs his attorney of record, to dismiss the Complaint above described, with prejudice.

The payment herein referred to is made purely by way of compromise and settlement and is in no way to be construed as an admission of liability on the part of any party.

IN WITNESS WHEREOF, this Receipt and Release has been executed this the 18th day of May, 1982.

WITNESSES:

Billy G. O'Ban

Jack N. Seymour, Jr.
JACK N. SEYMOUR, JR.

CERTIFICATE

We, the undersigned witnesses, do hereby certify that the above and foregoing Receipt and Release was read and explained to the Plaintiff and that it was executed in our presence and that the said Plaintiff, when questioned, acknowledged verbally that he fully understood the contents of the instrument and further understands that it was Receipt and Release of all of his rights, past, present or future, in connection with the above described injuries and that he executed the same as his own free act in exchange for Six Hundred Sixty-five Thousand and No/100 Dollars ($665,000.00), therein set forth and for that only.

WITNESS

Billy G. O'Ban
WITNESS

FILED

[illegible]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

JACK H. SEYMOUR, JR. * CIVIL [illegible]

VERSUS * NO. [illegible]

L & A CONTRACTING COMPANY, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD, GULF COAST PRE-STRESS COMPANY, INC., MOODY BROTHERS OF JACKSONVILLE, INC., RAY SIMS, SR., AND BROWN ENGINEERS, INC. *

CONSOLIDATED WITH: *

L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY AND MOODY BROTHERS OF JACKSONVILLE INC., AS OWNERS/OPERATORS OF THE M/V SWITCHER II, BARGE MOBRO 905 AND BARGE CMS 110, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY * CIVIL ACTION NO. S80-0359(R)

* * * * * * * * * * * *

SATISFACTION OF JUDGMENT

I, Joe Sam Owen, Attorney of Record for [illegible] H. Seymour, Jr., do hereby acknowledge that the Judgment entered in the above cause on the 18th day of May, 1982 had been fully paid and satisfied. I hereby appoint Verta Lee Swetman, Clerk of the United States District Court for the Southern District of Mississippi, Southern Division, as my Attorney-In-Fact to enter into any Judgment Records this document or any other [illegible]ation necessary to show full payment and satisfaction of [illegible] Judgment.

WITNESS MY SIGNATURE this the 18th day [illegible] 1982.

JOE SAM OWEN, Attorney for Plaintiff,
Jack H. Seymour, Jr.

FILED
MAY 1 1982
T. Hendl

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

JACK N. SEYMOUR, JR.

VERSUS

CIVIL ACTION NO. S80-0274(N)

L & A CONTRACTING COMPANY,
W. R. FAIRCHILD CONSTRUCTION
COMPANY, LTD., GULF COAST
PRE-STRESS COMPANY, INC.,
MOODY BROTHERS OF JACKSONVILLE,
INC., RAY SIMS, SR., AND BROWN
ENGINEERS, INC.

CONSOLIDATED WITH:

L & A CONTRACTING COMPANY,
GULF COAST PRE-STRESS COMPANY
AND MOODY BROTHERS OF JACKSONVILLE
INC., AS OWNERS/OPERATORS OF THE
M/V SWITCHER II, BARGE MORRO 906
AND BARGE CMS 110, PRAYING FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY

CIVIL ACTION NO. S80-0358(N)

JUDGMENT

The parties hereto having come before this Court on Stipulation and Motion for Entry of Judgment, and this Court having examined such stipulation and having examined the Plaintiff and his counsel in open Court concerning the facts and circumstances surrounding the accident and resulting injuries giving rise to this action and being satisfied that the facts were fairly presented, does find as follows, to-wit:

I.

That Jack N. Seymour, Jr. Plaintiff, on or about September 25, 1978 was employed by L & A Contracting Company as a member of the crew and in the capacity as a seaman aboard the Barge MORRO 906 which at the time was owned by Moody Brothers of Jacksonville, Inc., and operated by L&A Contracting Company and Gulf Coast Pre-Stress Company, Inc. That on such date Jack N. Seymour, Jr. was struck by a concrete slab while working on the deck of the Barge MORRO 906 and was pinned,

1812-1815

injuring his pelvic area, right leg and associated parts of his anatomy. That such injury consisted of a pelvic fracture, traumatic rupture of the urinary bladder, traumatic transection of the prostatomembranous urethra, which required surgery and possible severe nerve damage to peripheral nerves supplying the right pelvic area.

II.

This Court further finds that the Plaintiff incurred medical expenses in an amount in excess of $85,000.00 all of which has been paid by L & A Contracting Company.

III.

That suit was filed by Jack N. Seymour, Jr. against L& A Contracting Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., Brown Engineers, Inc. and (an entity incorrectly identified in the pleadings as W. R. Fairchild Construction which is in fact a general partnership consisting of Wiley Fairchild, Herbert Fairchild, Rodney Fairchild and Charles D. Fairchild, General Partners doing business as W. R. Fairchild Construction Company, Ltd., hereinafter sometime referred to as "Fairchild"), and such Defendants either filed an Answer hereto denying any negligence and/or unseaworthiness of the vessel which caused or contributed to the accident and resulting injuries, or filed a petition seeking exoneration from or limitation of liability. That in order to avoid further litigation and expenses and to avoid the possibility of a Judgment being rendered against it, L & A Contracting Company has offered to the Plaintiff the sum and amount of $665,000.00 in full, final and complete settlement of any and all claims which Jack N. Seymour, J[illegible] against anyone arising out of the accident and resulting injuries. This lump sum settlement includes consideration for any past or future maintenance and cure claims which the Plaintiff may have or which may arise as a result of the above described accident.

IV.

This Court further finds that after interrogating the Plaintiff and his counsel, that both are aware of all of the facts and circumstances leading up to and culminated in the above described accident. That with such knowledge and understanding, both Plaintiff and his counsel have agreed that such offer is just, fair and equitable and that the same should be accepted in full, final and complete settlement of any claims of any nature, including claims for maintenance and cure, which the Plaintiff may have against L & A Contracting Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., Brown Engineers, Inc. and Fairchild, or their corporate successors, if any, for damages arising out of the aforementioned accident.

V.

This Court further finds that under the facts and circumstances that the settlement of $885,000.00 for any and all claims which the Plaintiff may have under the [illegible] Act, under general maritime law or any other claims or [illegible] of action the Plaintiff may now have or which may arise in the future including any claims for past or future maintenance and cure, should be approved by this Court. It is therefore,

ORDERED AND ADJUDGED that Judgment be entered for the Plaintiff against L & A Contracting Company for the sum and amount of $885,000.00. That upon payment of such judgment, L & A Contracting Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., Brown Engineers, Inc. and Fairchild shall be fully, finally and completely released and discharged from any and all liability of any kind or nature for damages arising out of the accident of September 28, 1979 aboard the Barge NOBRO 906 wherein the Plaintiff was injured. Further upon payment of such judgment, L & A Contracting Company, Gulf Coast Pre-Stress Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., Brown

Engineers, Inc. and Fairchild shall be fully and finally released and discharged from any obligation to Jack N. Seymour, Jr. for past or future maintenance and cure of any kind, such claims being hereby extinguished by the lump sum settlement. That upon receipt of the $865,000.00 Jack N. Seymour, Jr. is hereby authorized and directed to execute any and all documents necessary to accomplish such full and final discharge of all parties hereto, and that each party is to bear their respective costs.

It is further ORDERED, that the Crossclaim of Brown Engineers, Inc. against W. R. Fairchild Construction Company, Ltd. be and the same is hereby dismissed with prejudice, the parties to bear their respective costs.

ORDERED AND ADJUDGED, this the 18th day of May, 1982.

UNITED STATES ~~MAGISTRATE~~
DISTRICT JUDGE

Jack N. Seymour, Jr.
vs.
L & A Contracting Company, et al — CIVIL ACTION NO. S80-0374(N)
Consolidated with:
L & A Contracting Company, et al — Civil Action No. [illegible]

FILED
MAY 1 [illegible] 1982
By [illegible] Deputy

STATE OF MISSISSIPPI

COUNTY OF HARRISON

RECEIPT AND RELEASE

WHEREAS, Jack N. Seymour, Jr. was employed by L & A Contracting Company on and prior to September 25, 1979; and

WHEREAS, the Plaintiff alleges that on or about September 25, 1979, he was severely injured on board the Barge MORRO-905, while working as a member of the crew aboard said vessel, and while carrying out his proper duties and function as a member of the crew, which injuries consisted of but are not limited to injuries to the pelvic area; and

WHEREAS, the said Jack N. Seymour, Jr. has made claim against L & A Contracting Company, Gulf Coast Pre-Stress Company Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., Brown Engineers, Inc. and Wiley Fairchild, Herbert Fairchild, Rodney Fairchild and Charles D. Fairchild, general partners doing business as W. R. Fairchild Construction Company, Ltd., alleging that his injuries and disabilities as aforesaid were caused by the negligence and/or the unseaworthy condition existing aboard said vessel, liability for which has been denied; and

WHEREAS, in furtherance of his claim as aforesaid the said Jack N. Seymour, Jr. has instituted a suit in the United States District Court for the Southern District of Mississippi, Southern Division, entitled, "JACK N. SEYMOUR, JR. VERSUS L & A CONTRACTING COMPANY, W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD., GULF COAST PRE-STRESS COMPANY, INC., MOODY BROTHERS OF JACKSONVILLE, INC., RAY SIMS, SR., AND BROWN ENGINEERS, INC., CONSOLIDATED WITH: L & A CONTRACTING COMPANY, GULF COAST PRE-STRESS COMPANY AND MOODY BROTHERS OF JACKSONVILLE, INC., AS OWNERS/OPERATORS OF THE M/V SWITCHER II, BARGE MORRO 905 AND BARGE CMB 110, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY", bearing Cause No. S80-0374(N) consolidated with Cause No. S80-0366(N); and

WHEREAS, the parties desire to amicably settle and adjust their differences on the basis hereinafter set out;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that for and in consideration of the full sum of Six Hundred Sixty Five Thousand and No/100 Dollars ($665,000.00), cash in hand pai by L & A Contracting Company, receipt of which is hereby acknowledged, and due acquittance and discharge therefore granted; the said Jack N. Seymour, Jr. does hereby release, remise and forever discharge L & A Contracting Company, Gulf Coast Pre-Stre Company, Inc., Moody Brothers of Jacksonville, Inc., Ray Sims, Sr., Brown Engineers, Inc. and Wiley Fairchild, Herbert Fairchil Rodney Fairchild and Charles D. Fairchild, general partners doing business as W. R. Fairchild Construction Company, Ltd., an any subsidiary companies and affiliated companies thereof, including their agents, servants, employees, officers, managing agents, underwriters, successors and assigns, general and limite partners, the Barge MOBRO-908, of and from any and all rights, claims, causes of action, liens or remedies of whatever kind or nature which he now has or which his heirs, assigns, or legal representatives may hereafter acquire for damages or expense, arising out of his employment with L & A Contracting Company as aforementioned, including but without limitation, any rights or claims based upon any claim for unseaworthiness of the vessel hereinabove mentioned, or its master or crew, for wages, maintenance and cure, or under any compensation by statute, Federal or State, or any contract or policy of insurance and whether at law, in equity or in admiralty, and whether the same be now known or hereafter discovered.

In further consideration of the foregoing payment, the said Jack N. Seymour, Jr. hereby agrees, and by the execution of this Receipt and Release, directs his attorney of record, to dismiss the Complaint above described, with prejudice.

The payment herein referred to is made purely by way of compromise and settlement and in in no way to be construed as an admission of liability on the part of any party.

IN WITNESS WHEREOF, this Receipt and Release has been executed, this the 18th day of May, 1982.

Jack N. Seymour Jr

JACK N. SEYMOUR, JR.

WITNESSES:

Billy D. OBen

CERTIFICATE

We, the undersigned witnesses, do hereby certify that the above and foregoing Receipt and Release was read and explained to the Plaintiff and that it was executed in our presence and that the said Plaintiff, when questioned, acknowledged verbally that he fully understood the contents of the instrument and further understands that it was Receipt and Release of all of his rights, past, present or future, in connection with the above described injuries and that he executed the same as his own free act in exchange for Six Hundred Sixty-five Thousand and No/100 Dollars ($665,000.00), therein set forth and for that only.

WITNESS

Billy D. OBen

WITNESS

EXHIBIT 5

AFFIDAVIT

I, James K. Carroll, after being sworn, state as follows:

1. I am a practicing attorney and a partner in the law firm of Gelpi, Sullivan, Carroll and Laborde in New Orleans, Louisiana. I represented L & A Contracting Co., a defendant in the case of Jack N. Seymour, Jr. v. L & A Contracting Co., et al, Case No. S80-0274(N) in the Southern District of Mississippi. Judge Water L. Nixon, Jr. presided over that case, in which W. R. Fairchild Construction Co. was also a defendant.

2. At no point in the proceedings of Case No. S80-0274(N) did Judge Nixon ever recuse himself because of any financial or personal relationship he may have had with Wiley Fairchild or W. R. Fairchild Construction Company, nor did he ever disclose any such relationship to the parties in the case. I would have expected Judge Nixon to offer to recuse himself from the Seymour case, or at a minimum to have disclosed his relationship with Wiley Fairchild and W. R. Fairchild Construction Co. so that counsel could advise their clients and determine whether to seek recusal, if the following were true:

(a) That as a part of his investment Judge Nixon borrowed $9,500.00 from W. R. Fairchild Construction Co., a party in the Seymour case;

(b) that while the Seymour case was pending, W. R. Fairchild Construction Co. loaned $9,500.00 to Judge Nixon at a rate of 10% interest, with principal and interest payable within three years, at a time when Judge Nixon was borrowing from commercial banks at the then-market rate of 15% with principal and interest to be repaid within 90 days;

(c) that Judge Nixon never paid any out-of-pocket money to purchase his investment with Fairchild, but instead repaid the $9,500.00 loan only after receiving royalty payments from W. R. Fairchild Construction Co. in a greater amount;

(d) that Judge Nixon executed notes and accepted deeds from W. R. Fairchild Construction Co. that were backdated one year prior to their actual date of execution;

(e) that the oil royalty conveyances from W. R. Fairchild Construction Company to Judge Nixon were according to the deeds "effective from the first day of production";

(f) that by March of 1980, when the Seymour case was first assigned to him, Judge Nixon "definitely" had an agreement with Fairchild to go forward with his investment;

(g) that Judge Nixon's investment with Fairchild was not available to the general public;

(h) that Judge Nixon began receiving royalty checks from W. R. Fairchild Construction Co. during the pendency of the Seymour case, and as of March 16, 1982, a month prior to the pretrial conference in Seymour, Judge Nixon had received a total of $7,476.55 in royalties and had repaid $5,000.00 on his debt to W. R. Fairchild Construction Co.;

(i) that Judge Nixon was grateful to Wiley Fairchild for providing him with an investment opportunity and told Fairchild, "If there's ever anything I can do for you I'll do it, and if I can't I'll tell you I can't";

(j) that during the pendency of the Seymour case, Judge Nixon met and spoke on the telephone with Wiley Fairchild to discuss, inter alia, the progress of the investment.

James K Carroll

JAMES K. CARROLL

SWORN TO AND SUBSCRIBED BEFORE ME,
This 3rd day of February, 1989

NOTARY PUBLIC

MY COMMISSION EXPIRES:

AT DEATH

EXHIBIT 6

AFFIDAVIT

I, George E. Morse, state as follows
(Print Name)

1. I am an attorney and represented a party litigant in the case of Jack N. Seymour, Jr. v. L & A Contracting Co., et al., Case No. S80-0274(N) in the Southern District of Mississippi. U. S. District Judge Walter L. Nixon, Jr. presided over this case, a personal injury matter in which W. R. Fairchild Construction Co. was a party defendant. Among the rulings by Judge Nixon in the case was a Judgment of Dismissal entered on September 3, 1980, granting summary judgment in favor of W. R. Fairchild Construction Co. as to the claim of the plaintiff Seymour. The case was resolved through settlement and dismissed by order of Judge Nixon on May 18, 1982. W. R. Fairchild Construction Co. contributed no money to the settlement, and as part of the settlement all claims against Fairchild were dismissed.

2. At no point in the proceedings of Case No. S80-0274(N) did Judge Nixon ever recuse himself because of any financial or personal relationship he may have had with Wiley Fairchild or W. R. Fairchild Construction Company, nor did he ever disclose any such relationship to the parties in the case.

I certify under penalty of perjury that the facts set forth in this affidavit are true and correct to the best of my knowledge; information and belief.

1/4/89
Date

Signature

STATE OF MISSISSIPPI
COUNTY OF HARRISON

AFFIDAVIT OF GEORGE E. MORSE

Personally appeared before me the within named, George E. Morse, who after being duly sworn, on oath, does state as follows:

1. I am a practicing attorney, licensed in the State of Mississippi and admitted to practice in both state and federal courts in the State of Mississippi. I am a member of the law firm of WHITE & MORSE of Gulfport, Mississippi. Our practice consist primarily of the defense of personal injury cases, representing insurance companies that have the liability coverage for named defendants in personal injury lawsuits.

2. In 1980 I was retained by HOME INSURANCE COMPANY to defend claims filed by Jack N. Seymour in the cases styled: Jack N. Seymour, Jr. v. L & A Contracting Company, et al. civil action nos. S80-0274 (N) and S80-0359(N), United States District Court, Southern District of Mississippi.

HOME INSURANCE COMPANY had the liability coverage on W. R. FAIRCHILD CONSTRUCTION COMPANY [hereinafter FAIRCHILD] which had been sued by Seymour along with several other defendants. The amount of liability coverage available to FAIRCHILD was FIVE HUNDRED THOUSAND DOLLARS ($500,000.00). FAIRCHILD had its own lawyer, Honorable Bruce Aultman of Hattisburg, Mississippi, who monitored our representation of his client because of exposure of FAIRCHILD to a judgement in excess of the policy limits.

3. Based on my review of the civil docket sheets and my file I can represent that this case was originally assigned to Honorable Harold Cox, now deceased, who reassigned it to

Honorable Dan Russell. Because of his family relationship with a member of our firm, Judge Russell recused himself as he did automatically in every case where our firm was representing a party . The case was than reassigned to the only remaining District Judge, Honorable Walter Nixon.

4. I was not aware of any relationship that existed between my client's insured, or its principal, Wiley Fairchild and Judge Nixon. If I was asked to assume that Judge Nixon had purchased an assignment of certain oil and gas interest from Wiley Fairchild or the insured and the transaction was for the fair market value of those interests then I would not expect Judge Nixon to recuse himself from presiding over the case.

5. In this litigation claims were asserted by the plaintiff, Mr. Seymour, and a co-defendant, BROWN ENGINEERING CO., against W. R. FAIRCHILD CONSTRUCTION CO. I filed on behalf of FAIRCHILD a motion for summary judgement as to the plaintiff's claims. This motion was unopposed by the plaintiff and on the day set for hearing I was instructed by Judge Nixon to draft the FINDINGS AND CONCLUSIONS of the Court and an ORDER dismissing the plaintiff's claims against FAIRCHILD. On September 3, 1980 the Court entered the FINDINGS AND CONCLUSIONS and the ORDER of dismissal that I had drafted.

6. Later, I filed a motion for summary judgement on behalf of FAIRCHILD seeking a dismissal of the cross-claim filed by BROWN ENGINEERING. After hearing arguments on this motion Judge Nixon overruled FAIRCHILD'S motion for summary judgement.

7. In May of 1982 this case was settled by the parties for a total of SIX HUNDRED SIXTY-FIVE THOUSAND DOLLARS ($665,000.00). My client, HOME INSURANCE CO., contributed ONE HUNDRED SIXTY-SIX THOUSAND, TWO HUNDRED AND FIFTY DOLLARS ($166,250.00) of the total settlement amount under

its obligation as the insuror of W.R. FAIRCHILD CONSTRUCTION COMPANY. Because of the amount of liability coverage on FAIRCHILD, the named defendant did not contribute any funds towards the settlement.

8. The hearing on the proposed settlement and agreed judgement of dismissal was set before Magistrate John Roper on May 17, 1982. The final Order of Dismissal was signed by Judge Nixon on May 18, 1982.

9. At no time in presiding over the case did Judge Nixon show any favoritism to my client's insured or to any party in the case.

GEORGE E. MORSE

SWORN TO AND SUBSCRIBED BEFORE ME on this the 24th day of ~~February~~ Jan, 1989.

Kathy L Allen
NOTARY PUBLIC

My Commission Expires:

7-13-90

SEAL:

AFFIDAVIT

I, George E. Morse, after being sworn, state as follows:

1. I am a practicing attorney in Mississippi and was counsel for W. R. Fairchild Construction Co. in Jack N. Seymour, Jr. v. L & A Contracting Co., et al., Case No. S80-0274(N).

2. I have previously executed affidavits dated January 4, 1989 and January 24, 1989 describing my knowledge of the Seymour case. This affidavit is intended to clarify statements appearing in my January 24 affidavit.

3. To clarify paragraphs 2 and 7 of my January 24 affidavit, Home Insurance Company had applicable longshoreman's liability coverage not solely on W. R. Fairchild Construction Company, but on the joint venture, consisting of L & A Contracting Co. and W. R. Fairchild Construction Company, created to handle demolition of the then-existing Popps Ferry bridge. After Fairchild's motion for summary judgement as to the plaintiff's claims was granted by Judge Nixon on September 3, 1980, Home Insurance Company continued to have exposure in the case up to the policy limit of $500,000

because L & A Contracting Co., the other joint venture partner, remained in the case. I was concerned that the plaintiff's longshoreman's claim against L & A Contracting Company might result in a jury verdict of $500,000 or greater due to the severity of Seymour's injuries. If this occurred L & A Contracting Company could look to the longshoreman's coverage provided by Home Insurance Co. to pay up to $500.000 of any such judgment. Accordingly, to avoid the risk of a larger judgment against L & A, Home Insurance Co. agreed to contribute $166,250.00 in settlement of the case.

4. To clarify paragraph 4 of my January 24 affidavit, I was asked by counsel for Judge Nixon, who prepared that affidavit, to assume only that Judge Nixon purchased an oil and gas interest from Fairchild for fair market value. To me, this meant that it was a "done" transaction already bought and paid for at the time Judge Nixon was assigned the Seymour case. Counsel for Judge Nixon did not inform me of, or ask me to assume, the following facts:

a. that as a part of his investment Judge Nixon borrowed $9500 from W. R. Fairchild Construction Co., a party and my client in the Seymour case;

b. that W. R. Fairchild Construction Co. loaned this sum to Judge Nixon at a rate of 10% interest, with principal and interest payable within three years, at a time when Judge Nixon entered into oil investments with other parties financed through loans from commercial banks at the then-market rate of 15%, to be repaid within 90 days;

c. that Judge Nixon never paid any out-of-pocket money to purchase his investment with Fairchild, but instead repaid the $9500 loan only after receiving royalty payments from W. R. Fairchild Construction Co. in a greater amount;

d. that Judge Nixon executed notes and accepted deeds from W. R. Fairchild Construction Co. that were backdated one year prior to their actual date of execution;

e. that the oil royalty conveyances from W. R. Fairchild Construction Company to Judge Nixon were, according to the deeds, "effective from the first day of production";

f. that before or within a few weeks after the Seymour case was first assigned to him, Judge Nixon "definitely" had an agreement with Fairchild to go forward with his investment;

g. that the investment with Fairchild was not available to the general public;

h. that Judge Nixon began receiving royalty checks from W. R. Fairchild Construction Co. during the pendency of the Seymour case, and as of March 16, 1982, a month prior to the pre-trial conference in Seymour, Judge Nixon had received a total of $7,476.55 in royalties and had repaid $5,000 on his debt to W. R. Fairchild Construction Co.;

i. that Judge Nixon was grateful to Wiley Fairchild for providing him with an investment opportunity and told Fairchild, "If there's ever anything I can do for you I'll do it, and if I can't I'll tell you I can't";

Assuming that facts a through i recited above are correct, I believe that Judge Nixon should have disclosed his relationship with Fairchild to the parties.

George E. Morse

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 10th DAY OF FEBRUARY, 1989

MY COMMISSION EXPIRES: Kathy L Allen
Notary Public

7-13-90

EXHIBIT 7

STATE OF MISSISSIPPI
COUNTY OF HARRISON

AFFIDAVIT OF JOE SAM OWEN

Personally appeared before me the undersigned authority in and for the above mentioned jurisdiction the within named, Joe Sam Owen, who after being duly sworn on oath, does state as follows:

1. I am a practicing attorney and a partner in the law firm of OWEN, GALLOWAY & CLARK of Gulfport, Mississippi. I am licensed to practice in the State of Mississippi and admitted to practice in the state and federal courts of this state. My law practice since I went into private practice consist primarily of representation of personal injury claimants.

2. In September of 1979 I was retained by Jack N. Seymour, Jr. (hereinafter "SEYMOUR") to file a lawsuit seeking compensation for injuries he received in a construction accident while in the employ of L & A CONTRACTING COMPANY (hereinafter "L & A"). SEYMOUR was injured while working on a barge leased by L & A which was dismantling a bridge in Harrison County, Mississippi. I filed the original complaint on February 13, 1980 alleging several claims for relief against several defendants, including W.R. FAIRCHILD CONSTRUCTION COMPANY, LTD. (hereinafter "FAIRCHILD"). This complaint was amended on February 25, 1980 at which time an additional defendant was named and new allegations were made against all defendants. A copy of the original and first amended complaint are attached hereto and incorporated by reference as Exhibits "A" and "B" respectively. This civil action was filed in the United States District Court for the Southern District of Mississippi and is styled: Jack N. Seymour, Jr. versus L & A Construction Company, et al., civil action no. S80-0274(N).

3. This case was originally assigned to U.S. DISTRICT JUDGE HAROLD COX who apparently declined the case after which it was reassigned to JUDGE DAN RUSSELL. JUDGE RUSSELL recused himself from the case because of his family relationship with a member of a law firm representing one of the defendants. It was then reassigned to the only remaining DISTRICT JUDGE available to preside in the case, JUDGE WALTER L. NIXON, JR.

4. On March 20, 1980 a separate civil action was filed by L & A et al, as owners pro hac vice/operators of the barge on which SEYMOUR was injured, seeking to limit its liability to the value of the vessel. This civil action is styled: IN THE MATTER OF L & A CONSTRUCTION COMPANY et al, civil action no. S80-0359(N). A copy of this complaint is attached hereto and incorporated herein as Exhibit "C". This civil action was consolidated with civil action no. S80-0274(N) by consent order of the Court on April 29, 1980.

5. On July 14, 1980 we filed a second amended complaint in the consolidation actions. This amended complaint alleged an eighth cause of action against L & A based on its failure to pay maintenance and cure and a ninth cause of action against all defendants, except BROWN ENGINEERING, as owners pro hac vice/operators of the barge. It sought relief under the Longshoreman and Harborworkers Compensation Act (33 U.S.C.A. 905(b)). A copy of this second amended complaint is attached hereto and incorporated herein as Exhibit "D".

6. During the process of discovery it became clear to us that FAIRCHILD was not responsible for SEYMOUR'S injuries. When George E. Morse advised me that he was going to file a motion for summary judgment on behalf of FAIRCHILD I told him that I would not oppose that motion. Mr. Morse did file such a motion and set it for hearing before Judge Nixon on September 3, 1980. We did not oppose this motion and on the day set for hearing the Court entered its judgment of dismissal of SEYMOUR'S claims against FAIRCHILD. The judgment of dismissal was, in my opinion, correct in law and

fact and there being no opposition to the motion by the plaintiff, it was the only ruling available to the Court.

7. During the pendency of the SEYMOUR action I was not aware of any relationship between Judge Nixon and FAIRCHILD. I am now aware that Judge Nixon purchased some oil and gas interests from Wiley Fairchild and/or W. R. FAIRCHILD CONSTRUCTION COMPANY and that he held these interest during the pendency of these civil actions. If I were asked to assume that these interests were purchased for fair value and that the purchase price was financed by FAIRCHILD at an interest rate of ten percent (10%), I would not expect Judge Nixon to recuse himself from presiding in the cases because of this relationship. Judge Nixon did not show any favoritism to FAIRCHILD, or any other party, in these proceedings.

8. In April of 1982 a verbal settlement was reached by the parties; the terms of the settlement were negotiated through the attorneys for the parties. The Court played no active part in this process, except to advise the parties to report back on the progress of settlement negotiations and then approval of the final settlement. The hearing on the proposed settlement was conducted by Magistrate John Roper on May 18, 1982. Since only Judge Nixon could enter dispositive orders, he signed the FINAL JUDGMENT on May 18, 1982.

WITNESS my signature this 26 day of January, 1989.

JOE SAM OWEN

SWORN TO AND SUBSCRIBED BEFORE ME, this 26 day of [illegible]

January, 1989.

Deborah A. Butler
NOTARY PUBLIC

My Commission Expires:
[illegible]

SEAL

AFFIDAVIT

I, Joe Sam Owen, after being sworn, state as follows:

1. I am a practicing attorney and a partner in the law firm of Owen, Galloway & Clark in Gulfport, Mississippi. I am also attorney for Ms. Betty Lou Watkins, secretary to U.S. District Judge Walter L. Nixon, Jr., in connection with the impeachment inquiry concerning Judge Nixon now pending before the Subcommittee on Civil and Constitutional Rights of the U.S. House of Representatives. On January 26, 1989, I executed an affidavit in connection with the Subcommittee's impeachment inquiry. This affidavit is to clarify the statement made in the second sentence of paragraph 7 of my January 26, 1989 affidavit.

2. I could not render the same opinion set forth in the second sentence of paragraph 7 of my January 26, 1989 affidavit if I were asked to assume the following facts concerning the financial relationship between Judge Nixon and Wiley Fairchild:

a. that as a part of his investment Judge Nixon borrowed $9500 from W. R. Fairchild Construction Co., a party in the Seymour case;

b. that W. R. Fairchild Construction Co. loaned this sum to Judge Nixon at a rate of 10% interest, with principal and interest payable within three years, at a time when Judge Nixon borrowing from commercial banks at the then-market rate of 15%, to be repaid within 90 days;

c. that Judge Nixon never paid any out-of-pocket money to purchase his investment with Fairchild, but instead repaid the $9500 loan only after receiving royalty payments from W. R. Fairchild Construction Co. in a greater amount;

d. that Judge Nixon executed notes and accepted deeds from W. R. Fairchild Construction Co. that were backdated one year prior to their actual date of execution;

e. that the oil royalty conveyances from W. R. Fairchild Construction Company to Judge Nixon were, according to the deeds, "effective from the first day of production";

f. that by March of 1980, when the Seymour case was first assigned to him, Judge Nixon "definitely" had an agreement with Fairchild to go forward with his investment;

g. that Judge Nixon's investment with Fairchild was not available to the general public;

h. that Judge Nixon began receiving royalty checks from W. R. Fairchild Construction Co. during the pendency of the Seymour case, and as of March 16, 1982, a month prior to the pre-trial conference in Seymour, Judge Nixon had received a total of $7,476.55 in royalties and had repaid $5,000 on his debt to W. R. Fairchild Construction Co.;

i. that Judge Nixon was grateful to Wiley Fairchild for providing him with an investment opportunity and told Fairchild, "If there's ever anything I can do for you I'll do it, and if I can't I'll tell you I can't";

j. that during the pendency of the Seymour case, Judge Nixon met and spoke on the telephone with Wiley Fairchild to discuss, inter alia, the progress of the investment.

Joe Sam Owen

SWORN TO AND SUBSCRIBED BEFORE ME
This 17 day of February, 1989

Deborah A. Butler
Notary Public

MY COMMISSION EXPIRES:

MY COMMISSION [illegible]

EXHIBIT 8

AFFIDAVIT

I, **Dan M. Russell, Jr.**, on request of Peter E. Keith, Associate Special Counsel for the House of Representatives, Committee on the Judiciary, state as follows:

1. I am a United States District Judge for the Southern District of Mississippi, and was Chief Judge of that District during the period 1971-1982.

2. Among the cases originally assigned to me was **Jack N. Seymour, Jr. v. L & A Contracting Co., et al.**, No. S80-0274. However, the case was reassigned to Judge Nixon because my nephew, Paul M. Franke, Jr., was at that time a member of the law firm of White & Morse, which represented W.R. Fairchild Construction Co., a defendant in the case. At the time of reassignment of this case in 1980, there were three judges sitting in the Southern District - Judge Walter L. Nixon, Jr., Judge William Harold Cox, and me.

3. I recall one case I handled as a judge through reassignment after Judge Nixon recused himself. It was the case of **Paul Broadhead and the Peble Corporation, a Delaware Corporation, v. The Lincoln Savings Bank, a New York Corporation**, Civil Action No. E82-0105(N). Judge Nixon recused himself because of his friendship with Mr. Paul Broadhead, a plaintiff in the case, as evidenced by a copy of his recusal Order attached hereto as Exhibit "A".

I certify under penalty of perjury that the facts set forth in this affidavit are true and correct to the best of my knowledge, information and belief.

Jan. 30, 1989
Date

Dan M. Russell Jr.
United States District Judge

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAR 1 8 1983
CLARENCE A. PIERCE, CLERK

EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

PAUL BROADHEAD AND THE PEBLE CORPORATION, a Delaware Corporation — PLAINTIFFS

V. — CIVIL ACTION NO. E82-0105(N)

THE LINCOLN SAVINGS BANK, a New York Corporation — DEFENDANT

ORDER OF RECUSAL

For the following reason, the undersigned is compelled to recuse himself in this matter:

The plaintiff in the case sub judice is a close personal friend of the undersigned and therefore the undersigned must recuse himself pursuant to the dictates of 28 U.S.C. § 455(a) (1980).

THIS the 17th day of March, 1983.

Walter L. Nixon Jr.
UNITED STATES DISTRICT JUDGE

Biloxi, Mississippi

EXHIBIT 9

AFFIDAVIT

I, George M. Morse, state as follows:

1. I am an attorney and represented a party litigant in the case of The Boam Company, et al. v. Dependable Insurance Co., et al., Case No. S77-0385(N) in the Southern District of Mississippi. U.S. District Judge Walter L. Nixon, Jr. presided over this case, assigning certain pre-trial and trial matters to Magistrate John Roper, and the case was settled with approval by Judge Nixon.

2. At no point in the proceedings of Case No. S77-0385(N) did Judge Nixon ever recuse himself from the case because of any financial or personal relationship he may have had with Wiley Fairchild or W. R. Fairchild Construction Company. Nor did Judge Nixon disclose to me any such relationship.

I certify under penalties of perjury that the facts set forth in this affidavit are true and correct to the best of my knowledge, information and belief.

Signature George M. Morse   Date 1/3/89

DULIN AND DULIN, LTD
ATTORNEYS AT LAW
[illegible] - [illegible] STREET
GULFPORT, MS [illegible]

TOMMY DULIN
SUE ESTHER DULIN

POST OFFICE BOX [illegible]
TELEPHONE [illegible]

January 5, 1989

-CONFIDENTIAL-
-CERTIFIED MAIL-
-RRR-

Peter E. Keith, Esq.
Associate Special Counsel
U. S. House of Representatives
Committee on the Judiciary
Washington, D.C. 20515-6216

RE: Honorable Walter L. Nixon, Jr.
United States District Judge

Dear Mr. Keith:

Regarding your letter and enclosures of December 27, 1988, which I received on January 4, 1989, please be advised that I an unable to execute any Affidavit in this matter.

I have reviewed my file in The Boem Company case, and find nothing to indicate that Judge Nixon did or did not recuse himself. Likewise, I find nothing indiciating that Judge Nixon did or did not disclose any relationship between himself and Fairchild. And, finally, I have no independent recollection in regard to your inquiries.

Thank you.

Sincerely,

DULIN AND DULIN, LTD.

TOMMY DULIN

TD:daf

Mize, Blass, Ingram, Matthews, Stroud & Lenoir
Professional Association
Attorneys at Law

THE PEOPLES BANK BUILDING
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GULFPORT, MISSISSIPPI 39502

TELEPHONE (601) [illegible]
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CARROLL H. INGRAM
WEBB M. MIZE
W. JOEL BLASS
LARRY L. LENOIR
JOLLY W. MATTHEWS
HOWARD M. STROUD
JACK B. WELDY
HENRY F. LAIRD, JR.
ALAN E. MICHEL
MICHAEL V. RATLIFF
JAMES W. GLADDEN, JR.
BOB W. PITTMAN, JR.
ROBERT E. TAYLOR, JR.
CYNTHIA L. TOLBERT
KEVIN J. MCCABE
PAUL D. SULLIVAN
WALTER C. FERGUSON

OF COUNSEL
EVELYN SANDY

JOSEPH H. MIZE
[illegible]

ROBERT W. THOMPSON, JR.
[illegible]

HATTIESBURG OFFICE:
[illegible] WEST PINE STREET
HATTIESBURG, MS [illegible]
TELEPHONE [illegible]
FAX [illegible]

January 13, 1989

Peter E. Keith, Esquire
Associate Special Counsel
U. S. House of Representatives
Committee on the Judiciary
Washington, D. C. 20515-6216

Re: Impeachment Inquiry Concerning
Judge Walter L. Nixon, Jr.

Dear Mr. Keith:

I represented Magnolia Construction Company in the case of The Boam Company, et al v. Dependable Insurance Co., et al, Case No. S77-0385(N). Magnolia was brought into the case as a Third Party Plaintiff on Motion of the City of Gulfport, Mississippi, one of the Defendants in the case. Magnolia's claim was solely against the City of Gulfport, Mississippi.

The only portion of the case, to the best of my recollection, to be litigated was Magnolia's claim against the City of Gulfport, Mississippi, which was conducted before Magistrate John M. Roper on August 27, 1979. At the conclusion of the trial on or about August 28, 1979, Judge Roper ruled that Magnolia would be entitled to a judgment in the amount of $1,250.00.

After Judge Roper made his ruling, the other parties to the litigation apparently got together and settled the case. I was not involved in any aspects of the settlement which was apparently negotiated between the parties on August 29, 1979. Therefore, I have deleted from the affidavit sent to me the words indicating that I was privy to Judge Nixon's involvement in the settlement.

I trust that the affidavit, as amended, will suffice for your purposes.

Yours truly,

Larry L. Lenoir
LARRY L. LENOIR

LLL:deq
enclosure

AFFIDAVIT

I, LARRY L. LENOIR, state
(Print Name)
as follows:

1. I am an attorney and represented a party litigant in the case of The Boam Company, et al. v. Dependable Insurance Co., et al., Case No. S77-0385(N) in the Southern District of Mississippi. U.S. District Judge Walter L. Nixon, Jr. presided over this case, assigning certain pre-trial and trial matters to Magistrate John Roper~~, and the case was settled with approval by Judge Nixon.~~ LLL

2. At no point in the proceedings of Case No. S77-0385(N) did Judge Nixon ever recuse himself from the case because of any financial or personal relationship he may have had with Wiley Fairchild or W. R. Fairchild Construction Company, nor did he ever disclose any such relationship to the parties in the case.

I certify under penalty of perjury that the facts set forth in this affidavit are true and correct to the best of my knowledge, information and belief.

JANUARY 13, 1989
Date

Larry L. Lenoir
Signature

AFFIDAVIT

I, Stanford E. Morse, Jr., state as follows:

1. I am an attorney and represented a party litigant in the case of The Boam Company, et al. v. Dependable Insurance Co., et al., Case No. S77-0385(N) in the Southern District of Mississippi, U. S. District Judge Walter L. Nixon, Jr. presided over this case, assigning certain pre-trial and trial matters to Magistrate John Roper, and the case was settled with approval by Judge Nixon.

2. At no point in the proceedings of Case No. S77-0385(N) did Judge Nixon ever recuse himself from the case because of any financial or personal relationship he may have had with Wiley Fairchild or W. R. Fairchild Construction Company, nor did he ever disclose any such relationship to me as attorney for the City of Gulfport which was a party in this case.

I certify under penalty of perjury that the facts set forth in this affidavit are true and correct to the best of my knowledge, information and belief.

Date

Signature

AFFIDAVIT

I, JAMES B. GALLOWAY, state
(Print Name)
as follows:

1. I am an attorney and represented a party litigant in the case of The Boam Company, et al. v. Dependable Insurance Co., et al., Case No. S77-0385(N) in the Southern District of Mississippi. U.S. District Judge Walter L. Nixon, Jr. presided over this case, assigning certain pre-trial and trial matters to Magistrate John Roper, and the case was settled with approval by Judge Nixon.

2. At no point in the proceedings of Case No. S77-0385(N) did Judge Nixon ever recuse himself from the case because of any financial or personal relationship he may have had with Wiley Fairchild or W. R. Fairchild Construction Company, nor did he ever disclose any such relationship to the parties in the case, TO THE BEST OF MY RECOLLECTION.
JBG

I certify under penalty of perjury that the facts set forth in this affidavit are true and correct to the best of my knowledge, information and belief.

January 4, 1989
Date

Signature

LEONARD A. BLACKWELL II
GARY E. WHITE
CAROL M. MCGILVRAY
CARTER O. BISE

BLACKWELL & WHITE
ATTORNEYS AND COUNSELORS AT LAW
[illegible] TWENTY-THIRD AVENUE
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TELEPHONE
POST OFFICE BOX
GULFPORT, MS
EIN #
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January 3, 1989

Peter E. Keith, Esquire
Committee on the Judiciary
U.S. House of Representatives
Annex II, Room 366
Washington, DC 20515

Re: Impeachment Inquiry Concerning Judge Walter L. Nixon, Jr.

Dear Mr. Keith:

I am signing and returning to you the affidavit sent to me in your letter of December 27, 1988, regarding the investigation made into the activities of Judge Walter L. Nixon, Jr. As you have been no doubt been able to tell from the information you sent to me, the case of The Boam Company, et al. v. Dependable Insuracne Co., et al. involved many parties and many competing interests, all of which had to be ground smooth by the wheels of contention in spirited settlement negotiations and discussions between the lawyers. As I recall there was very little testimony, if any, in this matter and if there was any it was heard before Hon. John Roper, United States Magistrate.

I say all of the foregoing to indicate that I do not believe that justice was compromised in any respect nor the integrity of Federal Judicial process affected whatsoever by any prior dealings which Nixon may have had with W.R. Fairchild or W.R. Fairchild Construction Company.

I can certainly state that had Judge Nixon disclosed to me that he had a business relationship with W.R. Fairchild Construction Company, I might very well have agreed, that he as the presiding judge could enter any final order which Judge Roper might recommend to him.

I guess what I am trying to convey to you is that the Boam case was one in which no action taken by Judge Nixon, as I remember it, affected the settlement result in any respect whatsoever. With the number of cases that were pending on Judge Nixon's docket at the time it is doubtful, in my opinion, that he even knew of the existence of this case or of any involvement therein by W.R. Fairchild Construction Company.

The affidavit you sent me to sign would seem to imply that the failure of disclosure of a personal relationship with Wiley Fairchild or financial relationship with him or his company might have affected the outcome of the Bohm Case; I certainly do not wish to convey that impression nor to imply in any manner that anything was amiss respecting the quality of justice received by this out-of-court settlement.

With kind regards, I am,

Very truly yours,

LEONARD A. BLACKWELL II

LAB:sjp

Enclosure

AFFIDAVIT

I, Leonard A. Blackwell II, state
(Print Name)
as follows:

1. I am an attorney and represented a party litigant in the case of The Boam Company, et al. v. Dependable Insurance Co., et al., Case No. S77-0385(N) in the Southern District of Mississippi. U.S. District Judge Walter L. Nixon, Jr. presided over this case, assigning certain pre-trial and trial matters to Magistrate John Roper, and the case was settled with approval by Judge Nixon.

2. At no point in the proceedings of Case No. S77-0385(N) did Judge Nixon ever recuse himself from the case because of any financial or personal relationship he may have had with Wiley Fairchild or W. R. Fairchild Construction Company, nor did he ever disclose any such relationship to the parties in the case.

I certify under penalty of perjury that the facts set forth in this affidavit are true and correct to the best of my knowledge, information and belief.

12/29/88
Date

Len Blackwell
Signature

PETE H. CARRUBBA
Attorney At Law
300 East Railroad Street
Long Beach, Mississippi 39560

January 9, 1989

P.O. Box 398
(601) 868-7192

Peter E. Keith, Esquire
Associate Special Counsel
Committee on the Judiciary
U. S. House of Representatives
Annex II, Room 366
Washington, DC 20515

Re: Impeachment Inquiry Concerning Judge Walter L. Nixon, Jr

Dear Mr. Keith:

I have and thank you for your December 27, 1988, letter with the enclosures, including the form of affidavit, concerning the above-captioned matter.

Thr form of affidavit is somewhat broad in that it implies I have or had knowledge of Judge Nixon's conversations or dealings with others than myself, which knowledge I do no have. Consequently, in a spirit of cooperation with the Committee, I have redrafted and submit the enclosed affidavit based on my own personal knowledge and recollections.

I retired in 1982, and have a limited practice representing primarily one client. I do not have access to any detained information concerning the subject matter of your letter, other than my recollections hereafter set forth.

My recollection is that I took over representation of Dependable Insurance Company from Cy Faneca, in the matter of The Boam Company, et al., v. Dependable Insurance Co., et al., Case No. S77-0385(N), after Mr. Faneca left the firm from which I retired. Mr. Faneca had completed a considerable amount of work in the case. My concern and further pleadings, were directed to limiting the liability of Dependable Insurance Company to the amount of the subcontractor's bond furnished by it. The case was bifurcated; that is, a separate hearing was held on the claim of Magnolia Construction Company, who contracted with the City of Gulfport to complete work on a sewage lift station, after default by Newkirk Construction Company, the subcontractor and the principal on the bond furnished by Dependable, my then client. After that, my work consisted mainly of conferences with other lawyers and with Magistrate John Roper, in working out the settlement, which settlement was later approved by Judge Nixon on recommendation of the Magistrate. As I recall, in addition to the principal parties, there were numerous intervenors, among whom was W. R. Fairchild Construction Company. I had no idea whatsoever of any relationship, either personal or financial, of Judge Nixon with Wiley Fairchild or with W. R. Fairchild Construction Company--nor do I now, except from what I have read, seen or heard in the media, or those matters set out in your letter; all of which, of course, are not of my own personal knowledge sufficient in law to justify setting out ideas under oath as fact.

The truth is that Judge Nixon never did disclose to me personally that he had any close personal or financial relationship with Wiley Fairchild or with W. R. Fairchild Construction Company, if any he had, nor did he recuse himself at any time during the proceedings in the Case No. S77-0385(N). If he had recused himself it would have appeared as a matter of record in the case.

I trust the enclosed affidavit is satisfactory.

Respectfully yours,

Pete H. Carrubba

Encl.

AFFIDAVIT

I, Pete H. Carrubba, state as follows:

1. I am an attorney and represented a party litigant (the Dependable Insurance Company) in the case of The Boam Company, et al., v. Dependable Insurance Company, et al., Case No. S77-0385(N) on the docket of the United States District Court for the Southern District of Mississippi. United States District Judge, Walte L. Nixon, Jr., presided over this case, assigning certain pre-trial and trial matters to U. S. Magistrate John Roper; and the case was settled with approval by Judge Nixon.

2. At no point in the proceedings of said Case No. S77-0385(N) did Judge Nixon ever disclose to me that he had any close personal or financial relationship with Wiley Fairchild or with W. R. Fairchild Construction, if any he had; nor did Judge Nixon ever recuse himself from this case.

I certify under penalty of perjury that the facts set forth in this affidavit are true and correct to the best of my knowledge, information and belief.

January 9, 1988

EXHIBIT 10

within the same term as the mandate was of no significance as to power of court to recall mandate, significance of the "term concept" was removed by 1948 amendment to the Judicial Code. Greater Boston Television Corp. v. F.C.C., 1971, 463 F.2d 268, 149 U.S.App.D.C. 322.

§ 453. Oaths of justices and judges

Notes of Decisions

1. Duty of court

Federal courts cannot countenance deliberate violations of basic constitutional rights; to do so would violate judicial oath to uphold Constitution of United States. Adamson v. C.I.R., C.A.9, 1984, 745 F.2d 541.

§ 454. Practice of law by justices and judges

West's Federal Forms

Code of Judicial Conduct, see § 5152 Comment

Notes of Decisions

2. Generally

Military judge does not come within prohibition set forth in this section against practice of law by any justice or judge appointed under authority of United States. U.S. v. Rachels, CMA 1979, 6 M.J. 232.

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(As amended Dec. 5, 1974, Pub.L. 93-512, § 1, 88 Stat. 1609; Nov. 6, 1978, Pub.L. 95-598, Title II, § 214(a), (b), 92 Stat. 2661.)

1978 Amendment. Pub.L. 95-598 struck out references to referees in bankruptcy in the section catchline and in subsecs. (a) and (e).

1974 Amendment. Pub.L. 93-512 substituted "Disqualification of justice, judge, magistrate, or referee in bankruptcy" for "Interest of justice or judge" in section catchline, reorganized structure of provisions, and expanded applicability to include magistrates and referees in bankruptcy and grounds for which disqualification may be based, and added provisions relating to waiver of disqualification.

Effective Date of 1978 Amendment. Amendment by Pub.L. 95-598 effective Oct. 1, 1979, see section 402(c) of Pub.L. 95-598, set out as a note preceding section 101 of Title 11, Bankruptcy. For procedures relating to bankruptcy matters during transition period, see note preceding section 151 of this title.

Effective Date of 1974 Amendment. Section 3 of Pub.L. 93-512 provided that: "This Act [amending this section] shall not apply to the trial of any proceeding commenced prior to the date of this Act [Dec. 5, 1974], nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act."

Legislative History. For legislative history and purpose of Pub.L. 93-512, see 1974 U.S. Code Cong. and Adm. News, p. 6351. See, also, Pub.L. 95-598, 1978 U.S. Code Cong. and Adm. News, p. 5787.

Federal Practice and Procedure

Bases for disqualification of federal judges, see Wright, Miller & Cooper: Jurisdiction § 3541 et seq.

Competency of witnesses, see Wright: Criminal 2d § 405.

Transfer for prejudice, see Wright: Criminal 2d § 342.

West's Federal Forms

Affidavit of bias or prejudice, see § 5152 and Comment thereunder.

Discussion of this section, see § 143 Comment.

Quorum, see § 7 Comment.

Criminal Procedure

Impartial judge, right to, see § 21.4.

Law Review Commentaries

Adjudicatory independence and the values of procedural due process. Martin H. Redish and Lawrence C. Marshall. 95 Yale L.J. 455 (1986).

Disqualification of Administrative Law Judges in California. J. Maloney. 16 U.S.F.L.Rev 229 (1982).

Judicial bias and financial interest as grounds for disqualification of federal judges. Seth E. Bloom. 35 Case W.Res.L.Rev. 662 (1984-85).

Should bias and interest lead to dissimilar results in judicial qualification practice? 27 Ariz.L.Rev. 171 (1985).

Notes of Decisions

Action against defendant by law clerk 10c
Affidavits 19
Amendments 1a
Appearance of partiality 34
Bankruptcy proceedings 15a
Bank transactions 33
Baseless or frivolous assertions 25b
Bias and prejudice 27
Burden of proof 17a
Case 8a
Comments of judge 26
Conflict of interests, judge or magistrate 26a
Construction
  Generally ½
  With other laws ½
Consent
  Generally 6

EXHIBIT 11

ABA CODE OF JUDICIAL CONDUCT

PREFACE TO CODE

Almost fifty years ago the American Bar Association formulated the original *Canons of Judicial Ethics*. Those Canons, occasionally amended, have been adopted in most states. In 1969 the Association determined that current needs and problems required revision of the Canons. In the revision process, the Association has sought and considered the views of the Bench and Bar and other interested persons. In the judgment of the Association this Code, consisting of statements of norms denominated canons, the accompanying text setting forth specific rules, and the commentary, states the standards that judges should observe. The canons and text establish mandatory standards unless otherwise indicated. It is hoped that all jurisdictions will adopt this Code and establish effective disciplinary procedures for its enforcement.

The Code of Judicial Conduct was adopted by the House of Delegates of the American Bar Association on August 16, 1972. The Commentary to Canon 2 was amended on August 17, 1984. Copyright © 1972 American Bar Association

ABA SPECIAL COMMITTEE ON STANDARDS OF JUDICIAL CONDUCT

(1969–1972)

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Berkeley, California
Chief Justice, Supreme Court of California, Retired

WALTER P. ARMSTRONG, JR.
Memphis, Tennessee
Lawyer, former chairman, Standing Committee on Ethics and Professional Responsibility

E. DIXIE BEGGS
Pensacola, Florida
Lawyer, former chairman of the Fellows of the American Bar Foundation

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Portland, Maine
Chief Judge, United States District Court of Maine

JAMES K. GROVES
Denver, Colorado
Justice, Supreme Court of Colorado

IVAN LEE HOLT, JR.
St. Louis, Missouri
Judge, 22nd Judicial Circuit of Missouri

IRVING R. KAUFMAN
New York, New York
Judge, United States Court of Appeals, Second Circuit

ROBERT A. LEFLAR
Fayetteville, Arkansas
Distinguished Professor, University of Arkansas Law School; Director, Appellate Judges Seminars, New York University Law School

WILLIAM L. MARBURY
Baltimore, Maryland
Lawyer, member of the American Law Institute Council

GEORGE H. REVELLE
Seattle, Washington
Judge, Superior Court of the State of Washington

WHITNEY NORTH SEYMOUR
New York, New York
Lawyer, former president of the American Bar Association

W. O. SHAFER
Odessa, Texas
Lawyer, former chairman of the National Conference of State Bar Presidents

POTTER STEWART
Washington, D.C.
Associate Justice, Supreme Court of the United States

EDWARD L. WRIGHT
Little Rock, Arkansas
Lawyer, former president of the American Bar Association

E. WAYNE THODE
Salt Lake City, Utah
Reporter, Professor of Law, University of Utah College of Law

GEOFFREY C. HAZARD, JR.
New Haven, Connecticut
Consultant, Professor of Law, Yale Law School

Staff Directors

FREDERICK R. FRANKLIN 1969–1970

FREDERICK W. BECK 1970–1971

C. RUSSELL TWIST 1971–1972

Contents

Preface to Code 47

Canons *Pages*

1 A Judge should uphold the integrity and independence of the judiciary 51

2 A Judge should avoid impropriety and the appearance of impropriety in all his activities 51

3 A Judge should perform the duties of his office impartially and diligently .. 51

4 A Judge may engage in activities to improve the law, the legal system, and the administration of justice 52

5 A Judge should regulate his extrajudicial activities to minimize the risk of conflict with his judicial duties 53

6 A Judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities 54

7 A Judge should refrain from political activity inappropriate to his judicial office 54

Compliance with the Code of Judicial Conduct 55

Effective date of Compliance 55

CANON 1

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Commentary

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willing-

It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women, and others, that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on the history of the organization's selection of members and other relevant factors. Ultimately, each judge must determine in the judge's own conscience whether an organization of which the judge is a member practices invidious discrimination.

The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons.

CANON 3

A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. ADJUDICATIVE RESPONSIBILITIES

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

Commentary

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

Commentary

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief *amicus curiae*.

(5) A judge should dispose promptly of the business of the court.

Commentary

Prompt disposition of the court's business requires a judge to devote adequate time to his duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with him to that end.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Commentary

"Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by Rule 3.6 of the *Model Rules of Professional Conduct*.

(7) A judge should prohibit broadcasting, televising, recording or photographing in courtrooms and areas immediately adjacent thereto during sessions of court, or recesses between sessions, except that under rules prescribed by a supervising appellate court or other appropriate authority, a judge may authorize broadcasting, televising, recording and photographing of judicial proceedings in courtrooms and areas immediately adjacent thereto consistent with the right of the parties to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice.[1]

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[1] *As amended August 11, 1982, American Bar Association House of Delegates, San Francisco, per Report 107.*

B. ADMINISTRATIVE RESPONSIBILITIES

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

Commentary

Disciplinary measures may include reporting a lawyer's misconduct to an appropriate disciplinary body.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

Commentary

Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

C. DISQUALIFICATION

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Commentary

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

(c) he knows that he, *individually* or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

Commentary

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii) may require his disqualification.

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

Commentary

According to the civil law system, the third degree of relationship test would, for example, disqualify the judge if his or his spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or lawyer in the proceeding.

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. REMITTAL OF DISQUALIFICATION

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Commentary

This procedure is designed to minimize the chance that a party or lawyer will feel coerced into an agreement. When a party is not immediately available, the judge without violating this section may proceed on the written assurance of the lawyer that his party's consent will be subsequently filed.

CANON 4

A JUDGE MAY ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him.

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund-raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

Commentary

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Extra-judicial activities are governed by Canon 5.

CANON 5

A JUDGE SHOULD REGULATE HIS EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH HIS JUDICIAL DUTIES

A. AVOCATIONAL ACTIVITIES

A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

Commentary

Complete separation of a judge from extra-judicial activities is neither possible nor wise; he should not become isolated from the society in which he lives.

B. CIVIC AND CHARITABLE ACTIVITIES

A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

Commentary

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which he is affiliated to determine if it is proper for him to continue his relationship with it. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization. He should not be a speaker or the guest of honor at an organization's fund-raising events, but he may attend such events.

(3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

Commentary

A judge's participation in an organization devoted to quasi-judicial activities is governed by Canon 4.

C. FINANCIAL ACTIVITIES

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

*** (2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business.**

Commentary

The Effective Date of Compliance provision of this Code qualifies this subsection with regard to a judge engaged in a family business at the time the Code becomes effective.

Canon 5 may cause temporary hardship in jurisdictions where judicial salaries are inadequate and judges are presently supplementing their income through commercial activities. The remedy, however, is to secure adequate judicial salaries.

* [Canon 5C(2) sets the minimum standard to which a full-time judge should adhere. Jurisdictions that do not provide adequate judicial salaries but are willing to allow full-time judges to supplement their incomes through commercial activities may adopt the following substitute until such time as adequate salaries are provided:

(2) Subject to the requirement of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business.

Jurisdictions adopting the foregoing substitute may also wish to prohibit a judge from engaging in certain types of businesses such as that of banks, public utilities, insurance companies, and other businesses affected with a public interest.]

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

Commentary

This subsection does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 7.

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

Commentary

Canon 3 requires a judge to disqualify himself in any proceeding in which he has a financial interest, however small; Canon 5 requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of his judicial duties; Canon 6 requires him to report all compensation he receives for activities outside his judicial office. A judge has the rights of an ordinary citizen, including the right to privacy of his financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of his duties. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. FIDUCIARY ACTIVITIES

A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of

his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

Commentary

The Effective Date of Compliance provision of this Code qualifies this subsection with regard to a judge who is an executor, administrator, trustee, or other fiduciary at the time this Code becomes effective.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

Commentary

A judge's obligation under this Canon and his obligation as a fiduciary may come into conflict. For example, a judge should resign as trustee if it would result in detriment to the trust to divest it of holdings whose retention would place the judge in violation of Canon 5C(3).

E. ARBITRATION

A judge should not act as an arbitrator or mediator.

F. PRACTICE OF LAW

A judge should not practice law.

G. EXTRA-JUDICIAL APPOINTMENTS

A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Commentary

Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

CANON 6

A JUDGE SHOULD REGULARLY FILE REPORTS OF COMPENSATION RECEIVED FOR QUASI-JUDICIAL AND EXTRA-JUDICIAL ACTIVITIES

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions.

A. COMPENSATION

Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. EXPENSE REIMBURSEMENT

Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. PUBLIC REPORTS

A judge should report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. His report should be made at least annually and should be filed as a public document in the office of the clerk of the court on which he serves or other office designated by rule of court.

CANON 7

A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO HIS JUDICIAL OFFICE

A. POLITICAL CONDUCT IN GENERAL

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

Commentary

A candidate does not publicly endorse another candidate for public office by having his name on the same ticket.

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2);

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

B. CAMPAIGN CONDUCT

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his campaign no earlier than [90] days before a primary election and no later than [90] days after the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

Commentary

Unless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate.

[Each jurisdiction adopting this Code should prescribe a time limit on soliciting campaign funds that is appropriate to the elective process therein.]

(3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

COMPLIANCE WITH THE CODE OF JUDICIAL CONDUCT

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. PART-TIME JUDGE

A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canon 5C(2), D, E, F, and G, and Canon 6C;

(2) should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or acts as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

B. JUDGE PRO TEMPORE

A judge *pro tempore* is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge *pro tempore* is not required to comply with Canon 5C(2), (3), D, E, F, and G, and Canon 6C.

(2) A person who has been a judge *pro tempore* should not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

C. RETIRED JUDGE

A retired judge who receives the same compensation as a full-time judge on the court from which he retired and is eligible for recall to judicial service should comply with all the provisions of this Code except Canon 5G, but he should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 5G. All other retired judges eligible for recall to judicial service should comply with the provisions of this Code governing part-time judges.

EFFECTIVE DATE OF COMPLIANCE

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may:

(a) continue to act as an officer, director, or non-legal advisor of a family business;

(b) continue to act as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family.

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EXHIBIT 12

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August 6, 1988

By HAND

Alan I. Baron
Special Counsel
Committee on the Judiciary
House Annex 2, Room 366
Washington, D.C. 20515

Dear Mr. Baron:

I write in response to your recent letter, which I received on August 1, concerning various financial records of Judge Nixon. I am enclosing with this letter a number of items which I believe should be responsive to your request, but I would like to make one point at the outset. We are providing these materials on a voluntary basis to assist the Subcommittee. The transactions which are the subject of your request involve no questionable activity whatever. Nevertheless, we have some concern that you are receiving these materials after the record has been closed in the Subcommittee's hearings, and you may not have any opportunity to have any features of these documents explained to you. For example, our documentation of these transactions is not perfectly complete.

We have noted that the Subcommittee's hearings on occasion focused on financial details as to which there was absolutely no impropriety -- for example, the apparent "Philyaw" royalty payment, or the entry in the royalty deeds of "Ten dollars and other valuable consideration" -- which were simply not understood. I seek your assurance that the Subcommittee will not leap to any conclusions with respect to the enclosed financial documentation without first providing us an opportunity to respond to any questions that may arise. I think that such a course makes sense for both the Subcommittee and Judge Nixon. I surely would not expect that any allegations against Judge Nixon could be based upon financial records which the Subcommittee has never provided Judge Nixon an opportunity to comment upon.

With this understanding, I am providing the following materials:

1. Chevron USA/Point Coupee Parish, LA investment -- This investment was financed by an unsecured, short term (90-day) note from the Mississippi Bank which was renewed on several occasions and was paid on December 17, 1982:

(1) Note # 58189, for $10,000, February 20, 1981;
(2) Renewed: May 21, 1981.
(3) Renewed: August 19, 1981.
(4) Renewed: January 25, 1982.
(5) Renewed: April 26, 1982.
(6) Renewed: July 26, 1982.
(7) Renewed: October 25, 1982.

(8) Invoice: May 12, 1981, and receipt for $375.00 interest paid.

(9) Invoice: August 19, 1981, interest due of $375.00.

(10) Invoice: January 25, 1982, interest due of $661.24.

(11) Invoice: April 26, 1982, interest due of $648.58.

(12) Invoice: July 26, 1982, interest due of $411.25.

(13) Invoice: October 15, 1982, interest due of $398.13.

(14) Payment: May 21, 1981, Check No. 2053, $375.00
Payment: August 25, 1981, Check No. 2103, $375

(15) Payment: Jan. 28, 1982, Check No. 2240, $397.67
Payment: April 26, 1982, Check No. 2282, $648.58

(16) Payment: July 22, 1982, Check No. 2347, $411.25
Payment: Oct. 22, 1982, Check No. 2418, $398.13
Payment: Dec. 17, 1982, Check No. 2449, $10,173.08

2. Pattison Petroleum Corporation/Clemens Unit #1 -- This investment was completed in two payments -- $4062.50 was paid on May 8, 1981, and $2,187.50 was paid on August 12, 1981. Each payment was financed separately through separate short-term notes with First Mississippi National Bank, which were renewed several times. The loans were paid off on December 17, 1982.

(a) Note #00531, May 8, 1981, for $4,100, for a 90-day term. [We have not located the initial note.]

(17) Renewed: November 4, 1981, for 90 days;

(18) Renewed: February 2, 1982, for 90 days;

(19) Renewed: May 3, 1982, for 90 days;

(20) Renewed: August 2, 1982, for 90 days.

(21) Renewed: Nov. 1, 1982 for 90 days

(22) Invoice: April 23, 1982, interest due of $166.76.

(23) Invoice: July 23, 1982, interest due of $173.73.

(24) Invoice: October 22, 1982, interest due of $148.00.

(25) Payment: August 12, 1981, Check No. 305, $164.00

(26) Payment: October 14, 1981, Check No. 2148, [$236.59 may have been inadvertently designated as interest due on Loan # 00740 instead of Loan # 00531; we cannot be sure.]

(25) Payment: Feb. 4, 1982, Check No. 2247, $167.09

(27) Payment: May 21, 1982, Check No. 2295, $166.76

Payment: August 6, 1982, Check No. 2358, $173.73

Payment: Nov. 2, 1982, Check No. 2428, $148.00

(28) Payment: Dec. 17, 1982, Check No. 2452, $4,443.36

(b) Note #01098, on August 13, 1981, for $3,500 (we have not found the initial note).

(29) Renewal: December 1, 1981;

(30) Renewal: March 1, 1982;

(31) Renewal: June 11, 1982;

(32) Renewal: September 9, 1982.

(33) Invoice: February 19, 1982, interest due of $140.24.

(34) Invoice: May 21, 1982, interest due of $147.47.

(35) Invoice: August 30, 1982, interest due of $160.18.

(36) Invoice: November 26, 1982, interest due of $129.76.

(37) Payment: Dec. 2, 1981, Check No. 2195, $208.98
Payment: March 9, 1982, Check No. 2261, $140.24
Payment: June 11, 1982, Check No. 2322, $147.47

(38) Payment: Sept. 13, 1982, Check No. 2384, $160.18
Payment: Dec. 17, 1982, Check No. 2454, $3,642.72

3. Geosouthern Energy Corporation/Winnie #1 -- This investment was financed by an unsecured, short-term note to the First Mississippi National Bank, beginning on November 6, 1981, for $10,985. The note was repaid, we have been advised, by Mr. William Pittman through the arrangement that Judge Nixon described in his testimony, whereby Judge Nixon withdrew from the investment when litigation relating to this enterprise was filed in the Southern District of Mississippi.

(39) Note #01576, November 4, 1981, for 180 days.

(40) Renewal: May 3, 1982, for 90 days;

(41) Renewal: August 2, 1982, for 90 days;

(42) Invoice: April 23, 1982, interest due of $902.43;

(43) Invoice: July 23, 1982, interest due of $465.60.

(44) Invoice: October 22, 1982, interest due of $452.12.

(45) Interest statement for final pay-off on November 18, 1982, of $74.19.

(46) Payment: May 21, 1982, Check No. 2294, $902.43
Payment: Aug. 6, 1982, Check No. 2357, $465.60

(47) Payment: Nov. 2, 1982, Check No. 2429, $452.12
Payment: Dec. 17, 1982, Check No. 2455, $74.19

I am also enclosing financial statements which were prepared for Judge Nixon as of August 31, 1980 and as of December 31, 1981. Although we have found no correspondence indicating that those financial statements were submitted to the lending banks in connection with the loans covered above, it is our belief that such financial statements for Judge Nixon routinely were kept on file by those banks. Accordingly, we think that the banks may well have seen these financial statements at the time the notes were made or renewed.

I would like, perhaps, to anticipate a question or two with respect to the 1980 and 1981 financial statements as compared to the December 31, 1982 financial statement that is Subcommittee Exhibit No. 26. The 1980 and 1981 financial statements were prepared by Charles Logan, Judge Nixon's accountant at the time, who died suddenly. Thus, the 1982 financial statement was prepared by Moore & Powell, a Mississippi accounting firm. There is a sizeable difference in the net worth estimate in the 1982 financial statement (in excess of $700,000) and the net worth estimates in the previous years (less than $300,000). Based on our research, it appears that this difference is due entirely to a change from the "historical cost" method of valuing assets in the Logan statements to the "estimated market value" method in the Moore & Powell statements. On October 1, 1982 the American Institute of Certified Public Accountants released its Statement of Position No. 82-1, which advised accountants to change personal financial statements from the historical cost basis to the more accurate estimated market value method. (For your convenience, we enclose a copy of Statement of Position 82-1.) Moore & Powell thus adopted the estimated market value approach with respect to Judge Nixon's financial statement. The increase in Judge Nixon's estimated net worth on the December 31, 1982 financial statement can largely be accounted for as follows:

1) Higher valuation for his residence and for the Biloxi office building owned by Nixon Enterprises, which is the building in which Judge Nixon practiced law before he was appointed to the bench. We have been advised that Moore & Powell

has contemporaneous valuations or opinion letters for the values used in the 1982 financial statement;

2) A 10-for-1 stock split in 1980 for the Peoples Bank of Biloxi stock held by Judge Nixon. Thus, the 1982 statement reflects 111 shares of Peoples Bank stock while the earlier statements reflect 11 shares. (Actually, the Logan statements simply missed the stock split, which occurred in 1980; but since the Logan statements were prepared on a cost basis, the error did not have any impact on the values listed for the investment.)

3) A much more detailed inventory of personalty.

I expect to be out of town from August 8 to August 22, but you can direct any questions on these or other matters to Mike Holleman or my colleague, Jay Alexander. As I mentioned to Pam Naughton last week, I would appreciate notice before any Subcommittee proceeding that might be held during the week of August 8, so I could make arrangements to travel to Washington in time for the hearing.

Very truly yours,

David O. Stewart

David Overlock Stewart

DOS/paa

(1)

NOTE	CUSTOMER NO	NOTE NUMBER	DUE DATE	CUSTOMER'S NAME
N	3404712	[illegible]	05/21/81	Judge Walter L. Nixon

58189

February 20, 1981
DATE OF NOTE

$ 10,000.00
AMOUNT OF NOTE

LENDER THE MISSISSIPPI BANK P. O. Box 979 329 East Capitol Street, Jackson, Hinds ____ Miss.

BORROWER-DEBTORS Judge Walter L. Nixon, P. O. Drawer A, Biloxi, Mississippi 39533

90 days [illegible]

[illegible] "Lender") or order

———Ten thousand and no/100——— Dollars

[illegible] 15 [illegible] date [illegible]

[illegible]

SECURITY – [illegible]

Open

[illegible]

ADDITIONAL DISCLOSURES TO DEBTORS REQUIRED BY FEDERAL LAW

INSURANCE DISCLOSURES

PROPERTY INSURANCE – [illegible]

CREDIT LIFE INSURANCE [illegible]

[illegible] $______

I DESIRE CREDIT LIFE COVERAGE

______
(Date) (Signature of Debtor to be insured)

DO NOT DESIRE CREDIT LIFE INSURANCE

Walter L. Nixon Jr.
(Date) (Signature of Debtor)

BASIC TERMS OF LOAN CONTRACT

1	Loan Proceeds	$ 10,000.00
2	Other Charges which are not part of Finance charge	
	a Credit Life Insurance	$
	b Property Insurance	$
	c Recording Fees	$
	d Title Fees/Lien Release Fees	$
	e	$
	f	$
2a	Total Other Charges to be Financed	$
3	Prepaid Finance Charge	$
4	Amount Financed (1 plus 2a minus 3)	$ 10,000.00
5	FINANCE CHARGE	$ 375.00
	a Interest	$ 375.00
	b Credit Life Insurance [illegible]	$
	c	$
6	ANNUAL PERCENTAGE RATE	15 %
7	Total of Payments [illegible]	$ 10,375.00

NOTICE: See other side for important information. This note is subject to the Additional Provisions, Terms, Undertaking, and Rights Set Forth on the reverse side hereof the same being incorporated herein by reference.

The undersigned Debtors do [illegible]

THE MISSISSIPPI BANK
RENEWED
MAY 27 1981
JACKSON, MISS.

CUSTOMER'S SIGNATURE
Walter L. Nixon Jr.
Judge Walter L. Nixon

WITNESS
WmHM

Officer	Branch	[illegible]	Social Security Number
WJR 26	01	CDW	

(2)

NOTE	CUSTOMER NO	NOTE NUMBER	DUE DATE	CUSTOMER'S NAME
R	3404712	58189	08/19/81	Judge Walter L. Nixon

May 21, 1981
DATE OF NOTE

$ 10,000.00
AMOUNT OF NOTE

LENDER: THE MISSISSIPPI BANK P. O. Box 979 329 East Capitol Street, Jackson, Hinds Miss.
(Mailing Address) (No. & Street) (City) (County)

BORROWER-DEBTORS Judge Walter L. Nixon, P. O. Drawer A, Biloxi, Mississippi 39533
(Full Names) (Address)

90 days after date for value received, we the signers, endorsers, sureties, and all of us jointly and severally (hereinafter collectively termed "Debtor") promise to pay to The Mississippi Bank (hereinafter termed "Lender") or order ——Ten thousand and no/100—— Dollars in lawful money of the United States with interest thereon at the rate of 15 percent per annum from date until paid.

In the event of DEBTOR'S DEFAULT (as hereinafter defined), Debtor shall be liable for all attorney's fees, court costs and expenses of whatever kind incident to collection of said indebtedness and the enforcement of any security interest held by Lender.

SECURITY — If this loan is secured, the security is an interest in:

Open

and proceeds under and as more fully described in the ☐ UCC Security Agreement ☐ Land Deed of Trust ☐ Other [illegible] [illegible]

ADDITIONAL DISCLOSURES TO DEBTORS REQUIRED BY FEDERAL LAW

INSURANCE DISCLOSURES

PROPERTY INSURANCE - Property insurance if written in connection with a secured transaction may be obtained by Debtor through any duly licensed insurance agent or broker. If obtained through lender, the cost thereof is $____ for ____ months.

CREDIT LIFE INSURANCE: This insurance ☐ is ☐ is not required to obtain this loan. If not required, no such insurance will be provided unless Debtor to be insured signs the appropriate statement below.

The cost of Credit Life insurance for the term of credit is $____

I DESIRE CREDIT LIFE COVERAGE

Date (Signature of Debtor to be insured)

I DO NOT DESIRE CREDIT LIFE INSURANCE

Walter L. Nixon

Date (Signature of Debtor)

BASIC TERMS OF LOAN CONTRACT

1 Loan Proceeds $____

2 Other Charges which are not part of finance charge

a Credit Life Insurance $____

c Property Insurance $____

d Recording Fees $____

e Time Fees/Lien Release Fees $____

f ____ $____

g ____ $____

2A Total Other Charges to be Financed $____

3 Prepaid Finance Charge $____

4 Amount Financed (1 plus 2A minus 3) $____

5 **FINANCE CHARGE** (itemize) $____

a Interest $____

b Credit Life Insurance (when required as condition for loan) $____

c ____ $____

6 **ANNUAL PERCENTAGE RATE** ____ %

7 Total of Payments (4 plus 5) $____

NOTICE. See other side for important information. This note is subject to the Additional Provisions, Terms, Undertaking, and Rights Set Forth on the reverse side hereof the same being incorporated herein by reference.

The undersigned Debtors do herewith acknowledge receipt of the Disclosures contained herein and in the Commercial Note.

WITNESS

CUSTOMER'S SIGNATURE

Walter L. Nixon

Judge Walter L. Nixon

Officer	Branch	Teller's initials	Social Security Number
26	01	ckw	

(3

NOTE	CUSTOMER NO.	NOTE NUMBER	DUE DATE	CUSTOMER'S NAME
R	3404712	58189	11-17-81	Judge Walter L. Nixon

Aug. 19, 1981 — DATE OF NOTE

$ 10,000.00 — AMOUNT OF NOTE

LENDER: [illegible] P.O. Box 979 329 E. Capitol St. Jackson Hinds Miss.

BORROWER-DEBTORS Judge Walter L. Nixon

P.O.Drawer A. Biloxi Ms. 39533

90 days [illegible] "Debtor" [illegible] "Lender" [illegible]

Ten thousand and No/100- - - Dollars [illegible] 15 [illegible] Date [illegible]

[illegible]

SECURITY – [illegible]

OPEN

[illegible] ☐ UCC Security Agreement, ☐ Land Deed of Trust, ☐ Other [illegible]

ADDITIONAL DISCLOSURES TO DEBTORS REQUIRED BY FEDERAL LAW

INSURANCE DISCLOSURES

PROPERTY INSURANCE – [illegible] $ ______ for ______ months.

CREDIT LIFE INSURANCE [illegible]

The cost of Credit Life Insurance for the term of credit is $ ______

I DESIRE CREDIT LIFE COVERAGE

(Date) (Signature of Debtor to be insured)

I DO NOT DESIRE CREDIT LIFE INSURANCE

8/19/81 Walter L. Nixon

(Date) (Signature of Debtor)

BASIC TERMS OF LOAN CONTRACT

1. Loan Proceeds $ ______
2. Other Charges which are not part of finance charge
   - a. Credit Life Insurance $ ______
   - b. Property Insurance $ ______
   - c. Recording Fees $ ______
   - d. Title Fees/Lien Release Fees $ ______
   - f. ______ $ ______
   - g. ______ $ ______

2A. Total Other Charges to be Financed $ ______

3. Prepaid Finance Charge $ ______
4. Amount Financed (1 plus 2A minus 3) $ ______
5. FINANCE CHARGE (Itemized) $ ______
   - a. Interest $ ______
   - b. Credit Life Insurance (when required as condition for loan) $ ______
   - c. ______ $ ______
6. ANNUAL PERCENTAGE RATE ______ %
7. Total of Payments (4 plus 5) $ ______

NOTICE: See other side for important information. This note is subject to the Additional Provisions, Terms, Undertaking, and Rights Set Forth on the reverse side hereof the same being incorporated herein by reference.

The undersigned Debtors do herewith acknowledge receipt of the Disclosures contained herein and in the Commitment Note.

WITNESS

CUSTOMER'S SIGNATURE

Walter L. Nixon

Judge Walter L. Nixon

Officer	Branch	Teller's Initials	Social Security Number
26 wp	01	ldr	

(4)

NOTE	CUSTOMER NO	NOTE NUMBER	DUE DATE	CUSTOMER'S NAME
R	3404712	58189	4/26/82	Judge Walter L. Nixon

January 25, 1982
(DATE OF NOTE)

$10,000.00
(AMOUNT OF NOTE)

LENDER THE MISSISSIPPI BANK P. O. Box 979, 329 E. Capitol St., Jackson, Hinds Miss.
(Mailing Address) (No. & Street) (City) (County)

BORROWER-DEBTORS Judge Walter L. Nixon, P. O. Drawer A, Biloxi, MS 39533
(Full Name) (Address)

91 days after date for value received, we the signers, endorsers, sureties, and all of us jointly and severally (hereinafter collectively termed "Debtor") promise to pay to The Mississippi Bank (hereinafter termed "Lender") or order

Ten Thousand and no/100------------------------------------- Dollars

in lawful money of the United States with interest thereon at the rate of 15.75 percent per annum from date until paid.

In the event of DEBTOR'S DEFAULT (as hereinafter defined), debtor shall be liable for all attorney's fees, court costs and expenses of whatever kind incident to collection of said indebtedness and the enforcement of any security interest held by Lender.

SECURITY — If this loan is secured, the security is an interest in

Open

and proceeds under and as more fully described in the ☐ UCC Security Agreement ☐ Land Deed of Trust ☐ Other [illegible] of even date. The security document also secures future and other indebtedness [illegible] property except that the security interest of the Security Agreement attaching to after acquired consumer goods, other than accessions, is limited to those goods acquired within 10 days from the date hereof. Lender claims a lien on all return of unearned insurance premiums and all Debtor's funds on deposit as allowed by law in event of default.

ADDITIONAL DISCLOSURES TO DEBTORS REQUIRED BY FEDERAL LAW

INSURANCE DISCLOSURES

PROPERTY INSURANCE - Property insurance if written in connection with a secured transaction may be obtained by Debtor through any duly licensed insurance agent or broker. If obtained through Lender, the cost thereof is $____ for ____ months.

CREDIT LIFE INSURANCE This insurance ☐ is ☐ is not required to obtain this loan. If not required, no such insurance will be provided unless Debtor to be insured signs the appropriate statement below.

The cost of Credit Life Insurance for the term of credit is $____

I DESIRE CREDIT LIFE COVERAGE

(Date) (Signature of Debtor to be insured)

I DO NOT DESIRE CREDIT LIFE INSURANCE

Walter L. Nixon Jr
(Date) (Signature of Debtor)

BASIC TERMS OF LOAN CONTRACT

1	Loan Proceeds	$ 10,000.00
2	Other Charges which are not part of finance charge	
	a Credit Life Insurance	$
	c Property Insurance	$
	d Recording Fees	$
	e Title Fees/Lien Release Fees	$
	f	$
	g	$
2A	Total Other Charges to be Financed	$
3	Prepaid Finance Charge	$
4	Amount Financed (1 plus 2A minus 3)	$ 10,000.00
5	**FINANCE CHARGE** (itemize)	$ 397.67
	a Interest $ 397.67	
	b Credit Life Insurance (when required as condition for loan) $	
	c $	
6	**ANNUAL PERCENTAGE RATE**	15.75 %
7	Total of Payments (4 plus 5)	$ 10,397.67

NOTICE: See other side for important information. This note is subject to the Additional Provisions, Terms, Undertaking, and Rights Set Forth on the reverse side hereof the same being incorporated herein by reference.

The undersigned Debtors do herewith acknowledge receipt of the Disclosures contained herein and in the Commercial Note

THE MISSISSIPPI BANK
RENEWED
APR
JACKSON

WITNESS

CUSTOMER'S SIGNATURE

Walter L. Nixon Jr
Judge Walter L. Nixon

Officer	Branch	Teller ID Initials	Social Security Number
26	01	cd	

NOTE	CUSTOMER NO	NOTE NUMBER	DUE DATE	CUSTOMER'S NAME
R	3404712	58189	7/26/82	Judge Walter L. Nixon

April 26, 1982 DATE OF NOTE

$ 10,000.00 AMOUNT OF NOTE

LENDER THE [illegible] BANK P. O. Box 979, 329 E. Capitol St., Jackson, Hinds Miss.
(Mailing Address) (No. & Street) (City) (County)

BORROWER-DEBTORS Judge Walter L. Nixon, P. O. Drawer A, Biloxi, MS 39533
(Full Name) (Address)

91 days after date for value received, we the signers, [illegible] and each of us jointly and severally [illegible] (collectively termed "Debtor") promise to pay to The [illegible] Bank [illegible] (termed "Lender") or order

Ten thousand and no/100 Dollars

in lawful money of the United States with interest thereon at the rate of 15.75 percent per annum from date until paid.

In the event of DEBTOR'S DEFAULT (as hereinafter defined), debtor shall be liable for all attorney's fees, court costs and expenses of whatever kind [illegible] of said indebtedness and the enforcement of any security interest held by Lender.

SECURITY — If this loan is secured, the security is an interest in:

Open

and proceeds under and as more fully described in the ☐ UCC Security Agreement, ☐ Land Deed of Trust, ☐ Other [illegible] [illegible]

ADDITIONAL DISCLOSURES TO DEBTORS REQUIRED BY FEDERAL LAW

INSURANCE DISCLOSURES

PROPERTY INSURANCE - Property insurance if written in connection with a secured transaction may be obtained by Debtor through any duly licensed insurance agent or broker. If obtained through lender, the cost thereof is $_____ for _____ months.

CREDIT LIFE INSURANCE. This insurance ☐ is, ☐ is not required to obtain this loan. If not required, no such insurance will be provided unless Debtor to be insured signs the appropriate statement below.

The cost of Credit Life Insurance for the term of credit is $_____

I DESIRE CREDIT LIFE COVERAGE

(Date) (Signature of Debtor to be insured)

I DO NOT DESIRE CREDIT LIFE INSURANCE

Walter L. Nixon

(Date) (Signature of Debtor)

BASIC TERMS OF LOAN CONTRACT

1	Loan Proceeds	$
2	Other Charges which are not part of finance charge	
	a Credit Life Insurance	$
	c Property Insurance	$
	d Recording Fees	$
	e Title Fees/Lien Release Fees	$
	f	$
	g	$
2A	Total Other Charges to be Financed	$
3	Prepaid Finance Charge	$
4	Amount Financed (1 plus 2A minus 3)	$
5	**FINANCE CHARGE** (itemized)	$
	a Interest	$
	b Credit Life Insurance (when required as condition for loan)	$
	c	$
6	**ANNUAL PERCENTAGE RATE**	%
7	Total of Payments (4 plus 5)	$

NOTICE: See other side for important information. This note is subject to the Additional Provisions, Terms, Undertaking, and Rights Set Forth on the reverse side hereof the same being incorporated herein by reference.

The undersigned Debtors do herewith acknowledge receipt of the Disclosures contained herein and in the Commercial Note.

WITNESS

Officer	Branch	Type & Indicator	Social Security Number
26/wp	01	cd	

wp

CUSTOMER'S SIGNATURE

Walter L. Nixon

Judge Walter L. Nixon

JUL

JA

Form File 32000

NOTE	CUSTOMER NO	NOTE NUMBER	DUE DATE	CUSTOMER'S NAME
R	3404712	58189	Demand, if no demand 10/25/82	Judge Walter L. Nixon

16

July 26, 1982
DATE OF NOTE

$ 10,000.00
AMOUNT OF NOTE

LENDER: THE MISSISSIPPI BANK P. O. Box 979, 329 E. Capitol St., Jackson, Hinds Miss.

BORROWER-DEBTORS: Judge Walter L. Nixon, P.O. Drawer A, Biloxi, MS 39533

Demand, if no demand
91 days [illegible]

[illegible]

Ten thousand and no/100 Dollars

[illegible] 15.75 [illegible] date [illegible]

[illegible]

SECURITY – [illegible]

Open

[illegible] ☐ [illegible] ☐ [illegible]

[illegible]

ADDITIONAL DISCLOSURES TO DEBTORS REQUIRED BY FEDERAL LAW

INSURANCE DISCLOSURES

PROPERTY INSURANCE – [illegible]
$ ________ for ________ [illegible]

CREDIT LIFE INSURANCE. [illegible]

[illegible] $ ________

I DESIRE CREDIT LIFE COVERAGE

____
[illegible]

I DO NOT DESIRE CREDIT LIFE INSURANCE
Walter L. Nixon Jr.
[illegible]

BASIC TERMS OF LOAN CONTRACT

1	Loan Proceeds	$
2	Other Charges which are not part of finance charge	
	a Credit Life Insurance	$
	c Property Insurance	$
	d Recording Fees	$
	e [illegible]	$
	f	$
	g	$
2A	Total Other Charges to be Financed	$
3	Prepaid Finance Charge	$
4	Amount Financed [illegible]	$
5	**FINANCE CHARGE** [illegible]	$
	a Interest	$
	b Credit Life Insurance [illegible]	$
	c	$
6	**ANNUAL PERCENTAGE RATE**	%
7	Total of Payments [illegible]	$

NOTICE: See other side for important information. This note is subject to the Additional Provisions, Terms, Undertaking, and Rights Set Forth on the reverse side hereof the same being incorporated herein by reference.

[illegible]

[illegible] D
08 [illegible]
[illegible]

CUSTOMER'S SIGNATURE
Walter L. Nixon Jr.
Judge Walter L. Nixon

Officer	Branch	[illegible]	Social Security Number
26/	01	ch	

[illegible]

[illegible]

(7

THE MISSISSIPPI BANK
333 CAPITOL STREET
JACKSON, MISSISSIPPI

NOTE	CUSTOMER NO	NOTE NO	DUE DATE On Demand if No Demand	CUSTOMER'S NAME
R	3404712	58189	1/24/83	Judge Walter L. Nixon

October 25, 1982 (Date of Note) $ 10,000.00 (Amount of Note)

This loan is obtained for ☐ Business ☐ Agricultural ☐ Personal, Family or Household

Borrowers-Debtors: Judge Walter L. Nixon, P. O. Drawer A, Biloxi, MS 39533 (Full Name) (Address)

On Demand and if no demand, 91 days after date for value received, we the signers, endorsers, sureties, and all of us jointly and severally (hereinafter collectively termed "Debtor") promise to pay to THE MISSISSIPPI BANK (hereinafter termed "Lender") or order Ten thousand and no/100——— Dollars in lawful money of the United States with interest thereon at the rate of New York Prime Floating percent per annum from date until paid.

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate of interest	FINANCE CHARGE The dollar amount the credit will cost you.	AMOUNT FINANCED The amount of credit provided to you or on your behalf	TOTAL OF PAYMENTS The amount you will have paid after you have made all payments as scheduled, based on the current annual percentage rate
%	$	$	$

YOUR PAYMENT SCHEDULE WILL BE:

Number of Payments	Amount of Payments	When Payments are Due

Filing Fees $________

The annual percentage rate may increase during the term of this transaction if the prime rate of ________ increases. Any increase will take the form of ☐ higher payment amounts or ☐ a larger amount due at maturity. If your loan were for $1,000 at 18% for 180 days and the rate increased to 18.5% in 90 days, the amount due at maturity would increase by $1.23, or if interest is payable monthly, your regular interest payment would increase by $ .41

This obligation is payable on demand

Security: You are giving a security interest in:
☐ The goods or property being purchased
☒ (Brief description of other property)

Open

This loan pd in full 12-17-82
Ck # 2449 $10,173.48
Peoples Bank of Biloxi
~~Special~~ Acct. B.L.

If you have given collateral securing other loans with us said collateral may also secure this loan. This loan is also secured by the right of the lender to charge your deposit account(s).

PREPAYMENT: If you pay off early, you will not have to pay a penalty.

See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

Required Deposit: ☐ If checked, you are required to maintain a deposit with the lender as a condition of this transaction. The annual percentage rate does not take into account your required deposit.

Property Insurance: You may obtain property insurance from anyone that is acceptable to lender.

Credit Life: Credit Life Insurance is not required to obtain credit and will not be provided unless you sign and agree to pay the additional costs. The cost of credit life insurance is $______ for ____ months.

I DESIRE CREDIT LIFE ____________

Itemization of Amount Financed

1	Amount given to you directly	$______
2	Amount paid on your account	$______
3	Amounts paid to others on your behalf	
	(a) Fees to public officials	$______
	(b) Premiums to insurance companies	$______
	(c) ______	$______
	(d) ______	$______
4	Prepaid Finance Charge	$______
5	Amount Financed (1 + 2 + 3 - 4)	$______

The undersigned Debtors do hereby agree with the terms of this note including the terms contained on the reverse side of this form and acknowledge receipt of at least one copy of this instrument.

Betty Lou Clark
Witness

Walter L. Nixon
Customer's Signature
Judge Walter L. Nixon

Bank's [illegible] ~~FR11~~ [illegible] [illegible] B.L.

Officer	Branch	Teller's Initials	Social Security Number
26	01	ch	

Form No. 30000 (Rev. 82)

(8)

THE MISSISSIPPI BANK

P. O. BOX [illegible], JACKSON, MISS. [illegible]

Spec

2053 ~~0~~

375.00

5/21/81

DATE May 12, 1981

Please complete the attached note and return with a check for $ 375.00 covering the following:

$________ Principal Due

$ 375.00 Interest Due May 21, 1981

$________ Insurance Due

Thank you for banking with us

Sincerely,

____

Officer

32002 — CS

[illegible]	NOTE NUMBER	DUE DATE	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	TERM	NOTE BALANCE
[illegible]	11[illegible]	[illegible]	[illegible]		[illegible]	[illegible]			05 21 81

COMMERCIAL LOAN DEPARTMENT

Cow 187

TELLER'S INITIALS

SERVICE CHARGE	
INTEREST PAYMENT	375.00
PRINCIPAL PAYMENT	
TOTAL	375.00

FORM CL 700

```
THE MISSISSIPPI BANK
JACKSON OFFICES
COMMERCIAL LOAN PAYMENT NOTICE
        08-19-81-
    **MATURITY PAYMENT *

WALTER L. NIXON, JR.
 PRINCIPAL BALANCE    10,000.00
 PAYMENT IS DUE OF    10,375.00
 DUE DATE          AUG 19, 1981
 NOTE NO.      3404712-58189-01
 NOTE DATE             05-21-81
 MATURITY DATE         08-19-81
 PAYMENT CONSISTS OF .........
   PRINCIPAL          10,000.00
   INTEREST              375.00
   LATE CHARGES             .00

 DAILY INTEREST       4.16667
 ANNUAL RATE IS 15.000 PERCENT
   RETAIN THIS PORTION
```

THE MISSISSIPPI BANK

P. O. BOX 979, JACKSON, MISS. 39205

DATE____________________

Please complete the attached note and return with a check for $ 375.00 covering the following:

$__________Principal Due

$ 375.00 Interest Due   8/19/81

$__________Insurance Due

Thank you for banking with us.

Sincerely,

____

Officer

Spec# 2103
8/25/81

32002 — CS

(10)

THE MISSISSIPPI BANK

P. O. BOX 879, JACKSON, MISS. 39205

DATE Jan. 25, 1982

#58189 - 10,000.00 -
Renewed to 4/26/82

Please complete the attached note and return with a check for $ 661.24 covering the following:

$ ______ Principal Due
$ 661.24 Interest Due
$ ______ Insurance Due

Thank you for banking with us

Sincerely,

#2240
1/28/82
______ Officer

32002 — CS

THE
MISSISSIPPI BANK
P. O. BOX 879, JACKSON, MISS. 39205

DATE April 26, 1982

Please complete the attached note and return with a check for $ 648.58 covering the following:

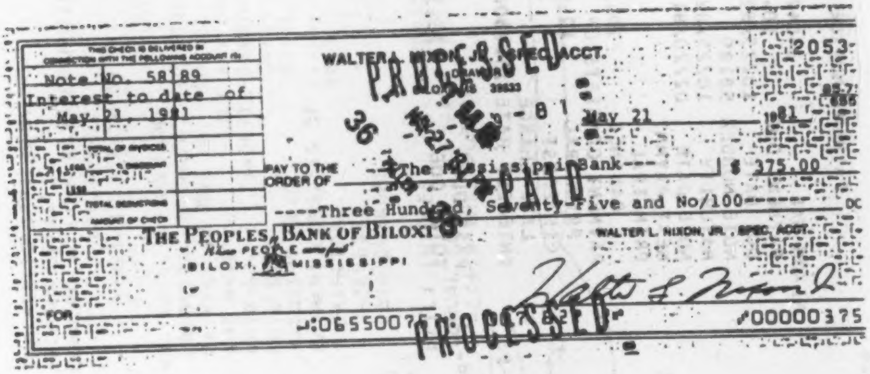
$ Principal Due Pd. 4-26-82
$ 648.58 Interest Due CK#2282
$ Insurance Due PBB
Thank you for banking with us. Spec Acct.

Sincerely,

Officer

32002 — CS

(14.



THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

Note No. 58189
Interest to date of
May 21, 1981

TOTAL OF INVOICES
LESS % DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

WALTER L. NIXON, JR., SPEC. ACCT.

2053

May 21 1981

PAY TO THE ORDER OF --The Mississippi Bank--- $ 375.00

----Three Hundred, Seventy-Five and No/100------

THE PEOPLES BANK OF BILOXI
"Where PEOPLE come first"
BILOXI, MISSISSIPPI

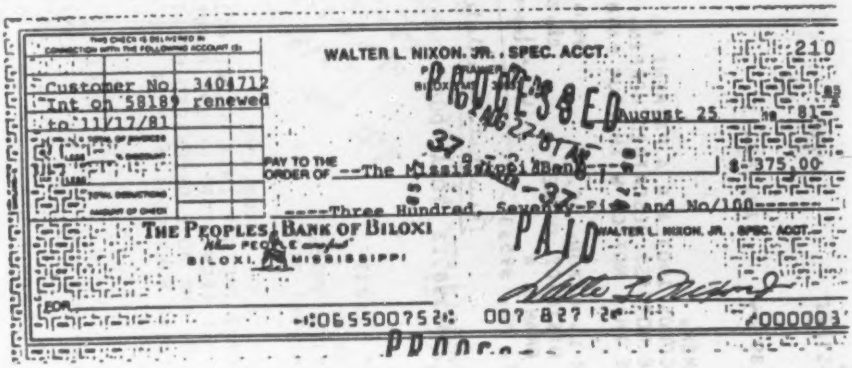
WALTER L. NIXON, JR., SPEC. ACCT.

Walter L. Nixon Jr

FOR

⑆06550075 ⑆ 007 827 ⑈ ⑈00000375

PROCESSED
PAID
36
PROCESSED



THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

Customer No. 3404712
Int on 58189 renewed
to 11/17/81

TOTAL OF INVOICES
LESS % DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

WALTER L. NIXON, JR., SPEC. ACCT.

210

August 25 19 81

PAY TO THE ORDER OF --The Mississippi Bank $ 375.00

----Three Hundred, Seventy-Five and No/100------

THE PEOPLES BANK OF BILOXI
"Where PEOPLE come first"
BILOXI, MISSISSIPPI

WALTER L. NIXON, JR., SPEC. ACCT.

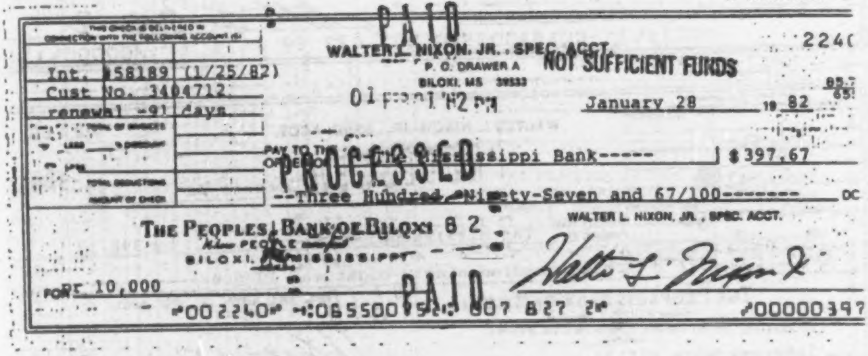
Walter L. Nixon Jr

FOR

⑆065500752⑆ 007 827 ⑈ ⑈000003

PROCESSED
AUG 27 '81
37
PAID

(15)



PAID

WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

NOT SUFFICIENT FUNDS

2240

85-7
65

01 FEB 1 '82 PM

January 28 19 82

THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

Int. #58189 (1/25/82)
Cust No. 3404712
renewal -91 days

TOTAL OF INVOICES
LESS ___ % DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

PAY TO THE ORDER OF The Mississippi Bank----- $ 397.67

PROCESSED

--Three Hundred Ninety-Seven and 67/100-------- DO

THE PEOPLES BANK OF BILOXI
"Where PEOPLE count"
BILOXI, MISSISSIPPI

8 2

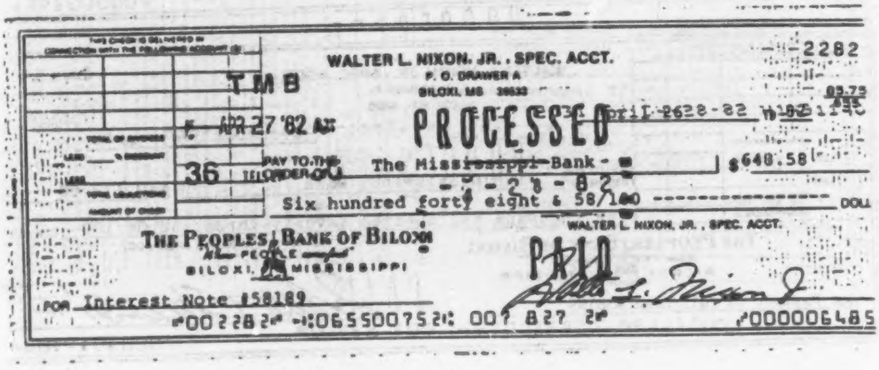
WALTER L. NIXON, JR., SPEC. ACCT.

Walter L. Nixon Jr.

FOR RE 10,000

PAID

⑈002240⑈ ⑆065500752⑆ 007 827 2⑈ ⑈00000397



THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

2282

85-75
655

TMB

APR 27 '82 AM

PROCESSED

April 26 28-82 19 82

TOTAL OF INVOICES
LESS ___ % DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

36

PAY TO THE ORDER OF The Mississippi Bank - $ 648.58

- 4 - 2 8 - 8 2

Six hundred forty eight & 58/100 ---------------- DOLL

WALTER L. NIXON, JR., SPEC. ACCT.

THE PEOPLES BANK OF BILOXI
"Where PEOPLE count"
BILOXI, MISSISSIPPI

PAID

Walter L. Nixon Jr.

FOR Interest Note #58189

⑈002282⑈ ⑆065500752⑆ 007 827 2⑈ ⑈000006485

THE MISSISSIPPI BANK
JACKSON OFFICES

JACKSON, MISSISSIPPI
39205

07-26-82
01-005
3404712-58189-04
86 10,411.25
OFFICER - 026

DEAR CUSTOMER-
OUR RECORDS INDICATE A PAYMENT WILL BE DUE ON THE ABOVE DATE FOR THE NOTE DESCRIBED HEREIN. IF THIS PAYMENT HAS BEEN MADE, PLEASE DISREGARD THIS NOTICE. PLEASE INCLUDE THIS NOTICE WITH YOUR REMITTANCE. THANK YOU.

WALTER L. NIXON, JR.
U. S. DISTRICT JUDGE
P. O. DRAWER A
BILOXI, MS. 39533

CURRENT DUE 10,411.25
RETURN THIS PORTION WITH YOUR REMITTANCE

Int. pd
7/24/82
ck# 2347
WLN Spec acct
Renewed
90 days

THE MISSISSIPPI BANK
JACKSON OFFICES
COMMERCIAL LOAN PAYMENT NOTICE
07-26-82
**MATURITY PAYMENT *

WALTER L. NIXON, JR.

PRINCIPAL BALANCE	10,000.00
PAYMENT IS DUE OF	10,411.25
DUE DATE	JLY 26, 1982
NOTE NO.	3404712-58189-04
NOTE DATE	04-26-82
MATURITY DATE	07-26-82
PAYMENT CONSISTS OF	....
PRINCIPAL	10,000.00
INTEREST	411.25
LATE CHARGES	.00
DAILY INTEREST	4.37500

ANNUAL RATE IS 15.750 PERCENT
RETAIN THIS PORTION

THE MISSISSIPPI BANK
JACKSON OFFICES
JACKSON, MISSISSIPPI 39205

10/15/82 COMMERCIAL LOAN DEPARTMENT
026
PAYMENT NOTICE

1 3404712 58189 84 10,398.13

NIXON WAL 3404712

PAYMENT DUE	10,398.13
DUE DATE	10/25/82
NOTE NUMBER	58189
MATURITY	10/25/82
NOTE DATE	02/20/81
NEXT PAYMNT	
PRINCIPAL BALANCE	10,000.00
PAYMENT CONSISTS OF	
~~PRINCIPAL~~	~~10,000.00~~
INTEREST	398.13
LATE CHARGE	0.00
INTEREST RATE	15.750000
PAST DUE	0.00
TOTAL DUE	10,398.13

DEAR CUSTOMER,

OUR RECORDS INDICATE A PAYMENT IS DUE FOR THE NOTE(S) DESCRIBED HEREIN. PLEASE INCLUDE THIS NOTICE WITH YOUR PAYMENT.

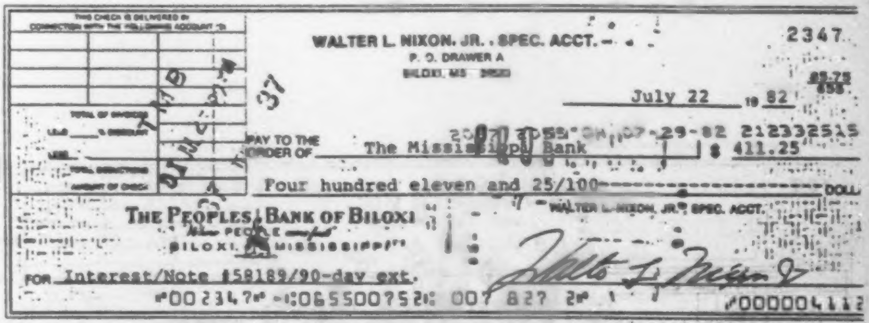
WALTER L. NIXON, JR.
U. S. DISTRICT JUDGE
P. O. DRAWER A
BILOXI, MS. 39533

Pd 10/22/82
Ck # 2418
WLN Spec. Acct

New note due date: 1-24-83

CURRENT DUE 10,398.13 TOTAL DUE 10,398.13

(16



WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS

2347

85-75
655

July 22 19 82

37

TMB

PAY TO THE ORDER OF The Mississippi Bank $ 411.25

Four hundred eleven and 25/100---------------------DOLL

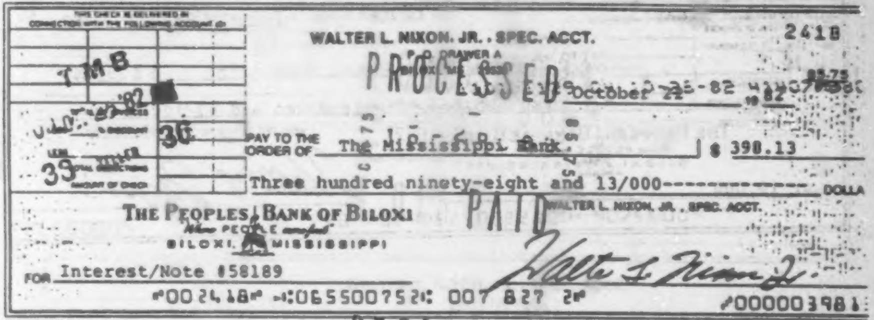
THE PEOPLES BANK OF BILOXI
BILOXI, MISSISSIPPI

WALTER L. NIXON, JR., SPEC. ACCT.

FOR Interest/Note #58189/90-day ext.

Walter L. Nixon Jr.

⑆002347⑆ ⑆065500752⑆ 007 827 2⑈ ⑈000004112



WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A

2418

PROCESSED

85-75
655

October 22 19 82

TMB

'82

36

39

PAY TO THE ORDER OF The Mississippi Bank $ 398.13

Three hundred ninety-eight and 13/000--------------DOLLA

PAID

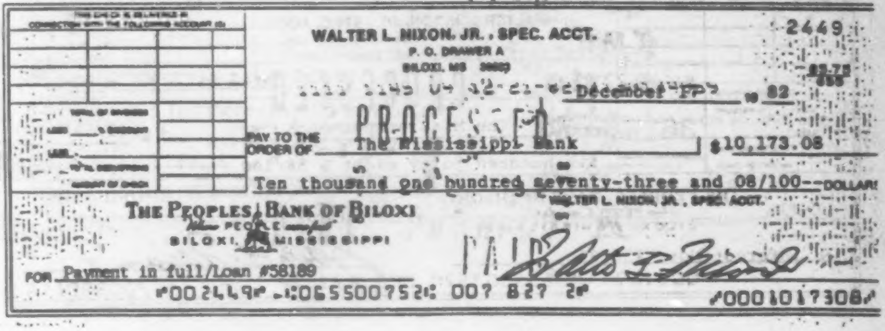
THE PEOPLES BANK OF BILOXI
BILOXI, MISSISSIPPI

WALTER L. NIXON, JR., SPEC. ACCT.

FOR Interest/Note #58189

Walter L. Nixon Jr.

⑆002418⑆ ⑆065500752⑆ 007 827 2⑈ ⑈00000398



WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS

2449

85-75
655

December [illegible] 19 82

PROCESSED

PAY TO THE ORDER OF The Mississippi Bank $10,173.08

Ten thousand one hundred seventy-three and 08/100--DOLLARS

THE PEOPLES BANK OF BILOXI
BILOXI, MISSISSIPPI

WALTER L. NIXON, JR., SPEC. ACCT.

PAID

FOR Payment in full/Loan #58189

Walter L. Nixon Jr.

⑆002449⑆ ⑆065500752⑆ 007 827 2⑈ ⑈0001017308⑈

2108900-531

E.D.P. No. Biloxi Mississippi August 2 19 82 $ 4,100.00

Ninety (90) days-- after date, for value received the undersigned promise(s) to pay to FIRST MISSISSIPPI NATIONAL BANK, or order, the sum of:

Four Thousand 0 Hundred and 00/100-- DOLLARS

with interest thereon at the rate of 16.50 per cent per annum from date until paid.

Upon the non-payment at any maturity of any of the obligations or liabilities of any party hereto, or upon the suspension, failure or insolvency of any party hereto, or upon any application for or the commencement of any bankruptcy, insolvency, receivership, reorganization, arrangement, dissolution or liquidation proceeding by or against any party hereto, or upon any party hereto making an assignment for the benefit of creditors, or upon the holder of this note deeming itself insecure, then and in any such event, this note and all other obligations and liabilities, direct or contingent, of the parties hereto and each of them, to First Mississippi National Bank shall forthwith mature and become due and payable, without demand, notice or putting default, anything herein contained to the contrary notwithstanding.

All parties hereto, whether maker or endorser, hereby authorize and empower said Bank at any time to appropriate and apply to the payment and extinguishing hereof and of any of the obligations or liabilities, direct or contingent, of any of the parties hereto, whether now existing or hereafter arising and whether then due or not due, any and all monies, stocks, bonds, or other property of any kind whatever now or hereafter in the hands of said Bank on deposit or otherwise to the credit of or belonging to any party hereto, including any monies or other property in transit to or from said Bank for any purpose, such application, however, to be made only to the obligations or liabilities, direct or contingent, of the party or parties to whom such monies or other property belong or for whom the same may be so on deposit or credited or to be credited. Any such application shall be at the option of the Bank, and failure to make any such application to the payment of any such liabilities shall not affect the liability of any party hereto. Full power and authority are hereby given the said Bank to sell, assign and transfer all such stocks, bonds or property at public or private sale, at its option, without either demand, advertisement or notice of any kind, all of which are hereby expressly waived.

If this note be not paid at maturity, however such maturity be occasioned, and said note is placed in the hands of an attorney at law for collection, all parties hereto bind themselves to pay a reasonable attorney's fee to such attorney.

All parties hereto, whether maker or endorser, hereby severally waive presentment for payment, demand, notice of nonpayment, protest, notice of protest, and all other requirements necessary to hold each of them and agree that the payment hereof may be extended from time to time, one or more times, and that this note may be renewed from time to time all without notice and hereby bind themselves unconditionally and as original promisors and makers for the payment hereof, in principal, interest, costs and attorney's fees.

This note is negotiable and payable at any office of FIRST MISSISSIPPI NATIONAL BANK.

Address:
P. O. Drawer O
Biloxi, MS 39533
Open

Walter L. Nixon
Walter L. Nixon, (Signature)
(Signature)
(Signature)

Note Number
11-1-82
When Due

1000062

FIRST MISSISSIPPI NATIONAL BANK
FIRST MISSISSIPPI NATIONAL BANK, BILOXI
P O BOX 70
BILOXI, MS 39530

04/23/82 COMMERCIAL LOAN DEPARTMENT
218

PAYMENT NOTICE

1 2108900 00531 64 4,266.76

DEAR CUSTOMER,
OUR RECORDS INDICATE A PAYMENT IS DUE FOR THE NOTE(S) DESCRIBED HEREIN. PLEASE INCLUDE THIS NOTICE WITH YOUR PAYMENT.

WALTER L NIXON JR
P O DRAWER A
BILOXI MS 39533

Int. pd. 5-21-82
PBB CK # 2295
Spec acct

NIXON WALTER L JR	2108900
PAYMENT DUE	4,266.76
DUE DATE	05/03/82
NOTE NUMBER	00531
MATURITY	05/03/82
NOTE DATE	05/08/81
NEXT PAYMNT	05/03/82
PRINCIPAL BALANCE	4,100.00
PAYMENT CONSISTS OF	
PRINCIPAL	4,100.00
INTEREST	166.76
LATE CHARGE	0.00
INTEREST RATE	16.500000
PAST DUE	0.00
TOTAL DUE	4,266.76

CURRENT DUE 4,266.76 TOTAL DUE 4,266.76

(17

2108900-531

E.D.P. No. ______ Biloxi , Mississippi November 4 , 19 81 $ 4,100.00

Ninety (90) days------------------------------ after date, for value received, the undersigned promise(s) to pay to FIRST MISSISSIPPI NATIONAL BANK, or order, the sum of

Four Thousand One Hundred and 00/100------------------------------ DOLLARS

with interest thereon at the rate of 17.50*see back of note per cent per annum from date until paid.

Upon the non-payment at any maturity of any of the obligations or liabilities of any party hereto, or upon the suspension, failure or insolvency of any party hereto, or upon any application for or the commencement of any bankruptcy, insolvency, receivership, reorganization, arrangement, dissolution or liquidation proceeding by or against any party hereto, or upon any party hereto making an assignment for the benefit of creditors, or upon the holder of this note deeming itself insecure, then and in any such event, this note and all other obligations and liabilities, direct or contingent, of the parties hereto and each of them, to First Mississippi National Bank shall forthwith mature and become due and payable, without demand, notice or putting default, anything herein contained to the contrary notwithstanding.

All parties hereto, whether maker or endorser, hereby authorize and empower said Bank at any time to appropriate and apply to the payment and extinguishing hereof and of any of the obligations or liabilities, direct or contingent, of any of the parties hereto, whether now existing or hereafter arising and whether then due or not due, any and all monies, stocks, bonds, or other property of any kind whatever now or hereafter in the hands of said Bank on deposit or otherwise to the credit of or belonging to any party hereto, including any monies or other property in transit to or from said Bank for any purpose, [illegible], however, to be made only to the obligations or liabilities, direct or contingent, of the party or parties to whom such monies or other property belong, or for whom the same may be on deposit or credited or to be credited. Any such application shall be at the option of the Bank, and failure to make any such application to the payment of any such liabilities shall not affect the liability of any party hereto. Full power and authority are hereby given the said Bank to sell, assign and transfer all such stocks, bonds or property at public or private sale, at its option, without either demand, advertisement or notice of any kind, all of which are hereby expressly waived.

If this note be not paid at maturity, however such maturity be occasioned, and said note is placed in the hands of an attorney at law for collection, all parties hereto bind themselves to pay a reasonable attorney's fee to such attorney.

All parties hereto, whether maker or endorser, hereby severally waive presentment for payment, demand, notice of nonpayment, protest, notice of protest, and all other requirements necessary to hold each of them and agree that the payment hereof may be extended from time to time for one or more terms, and that this note may be renewed from time to time all without notice and hereby bind themselves unconditionally and as original promisors and makers for the payment hereof, in principal, interest, costs and attorney's fees.

This note is negotiable and payable at any office of FIRST MISSISSIPPI NATIONAL BANK.

Address
P. O. Drawer A
Biloxi, MS 39533
Open

Walter L. Nixon Jr.
Walter L. Nixon (Signature)
(Signature)
(Signature)

Note Number
2-2-82
When Due

(OVER)

Each of the undersigned endorsers severally and unconditionally guarantees and agrees: (a) to pay the note on the reverse side hereof and the interest thereon at the rate provided; (b) to pay reasonable attorney's fees if said note is placed in the hands of an attorney at law for collection; (c) to be bound by all of the provisions of said note; (d) that payment of said note may be extended in whole or in part, and said note may be renewed from time to time, and any provision changed or modified, at any time and without notice to or permission of and without affecting or releasing the liability of the undersigned; and (e) the release of any one or more of the undersigned endorsers (including without limitation, the estate, personal representative, trustee in bankruptcy, or receiver of any undersigned endorser), regardless of how released, shall not constitute a release of any other undersigned endorser. Each of the undersigned endorsers severally waives presentment for payment, demand, notice of nonpayment, protest, notice of protest and all other requirements necessary to hold each of them. Each of the undersigned hereby expressly binds himself unconditionally as original promisor and maker of the note on the reverse side hereof to the same extent and with the same effect as if he signed on the face hereof as original maker.

(Signature)
(Signature)
(Signature)
(Signature)

THE PROCEEDS OF THIS LOAN WILL NOT BE USED PRIMARILY FOR PERSONAL, FAMILY, HOUSEHOLD OR AGRICULTURAL PURPOSES.

Disbursement Records

Maker acknowledges receipt of the proceeds of this note in cash.

(Signature)

For value received, maker requests bank to redistribute proceeds in the following manner:

renewal of Note #531

Walter L. Nixon Jr.
(Signature)

The proceeds of this note were used for the purpose of oil and gas exploration.

*Interest rate to float at FMNB prime rate, to be adjusted on the first day of each calendar month. Max. rate not to exceed that allowed by applicable law.

2108900-531

E.D.P. No. ______ Biloxi, Mississippi February 2 19 82 $ 4,100.00

Ninety (90) days after date, for value received, the undersigned promise(s) to pay to FIRST MISSISSIPPI NATIONAL BANK, or order, the sum of:

Four Thousand One Hundred and 00/100 DOLLARS

with interest thereon at the rate of 15.75* per cent per annum from date until paid.

Upon the non-payment at any maturity of any of the obligations or liabilities of any party hereto, or upon the suspension, failure or insolvency of any party hereto, or upon any application for or the commencement of any bankruptcy, insolvency, receivership, reorganization, arrangement, dissolution or liquidation proceeding by or against any party hereto, or upon any party hereto making an assignment for the benefit of creditors, or upon the holder of this note deeming itself insecure, then and in any such event, this note and all other obligations and liabilities, direct or contingent, of the parties hereto and each of them, to First Mississippi National Bank shall forthwith mature and become due and payable, without demand, notice or putting default, anything herein contained to the contrary notwithstanding.

All parties hereto, whether maker or endorser, hereby authorize and empower said Bank at any time to appropriate and apply to the payment and extinguishing hereof and of any of the obligations or liabilities, direct or contingent, of any of the parties hereto, whether now existing or hereafter arising and whether then due or not due, any and all monies, stocks, bonds, or other property of any kind whatever now or hereafter in the hands of said Bank on deposit or otherwise to the credit of or belonging to any party hereto, including any monies or other property in transit to or from said Bank for any purpose, such application, however, to be made only to the obligations or liabilities, direct or contingent, of the party or parties to whom such monies or other property belong, or for whom the same may be so on deposit or credited or to be credited. Any such application shall be at the option of the Bank, and failure to make any such application to the payment of any such liabilities shall not affect the liability of any party hereto. Full power and authority are hereby given the said Bank to sell, assign and transfer all such stocks, bonds or property at public or private sale, at its option, without either demand, advertisement or notice of any kind, all of which are hereby expressly waived.

If this note be not paid at maturity, however such maturity be accelerated, and said note is placed in the hands of an attorney at law for collection, all parties hereto bind themselves to pay a reasonable attorney's fee to such attorney.

All parties hereto, whether maker or endorser, hereby severally waive presentment for payment, demand, notice of nonpayment, protest, notice of protest, and all other requirements necessary to hold each of them and agree that the payment hereof may be extended from time to time, one or more times, and that this note may be renewed from time to time all without notice and hereby bind themselves unconditionally and as original promisors and makers for the payment hereof, in principal, interest, costs and attorney's fees.

This note is negotiable and payable at any office of FIRST MISSISSIPPI NATIONAL BANK.

BY RENEWAL
MAY 3 1982
HATTIESBURG, MISS.

Address:
P. O. Drawer A
Biloxi, MS 39533

Walter L. Nixon
Walter L. Nixon, Jr. (Signature)

(Signature)

(Signature)

Note Number

When Due
5-3-82

2108900 - 531

E.D.P. No. ________ Biloxi Mississippi May 3 19 82 WAG 6/24 $4,100.00

Ninety (90) days---------------- after date, for value received, the undersigned promise(s) to pay to FIRST MISSISSIPPI NATIONAL BANK, or order, the sum of Four Thousand One Hundred and 00/100---------------- DOLLARS with interest thereon at the rate of 17.00 per cent per annum from date until paid.

Upon the non-payment at any maturity of any of the obligations or liabilities of any party hereto, or upon the suspension, failure or insolvency of any party hereto, or upon any application for or the commencement of any bankruptcy, insolvency, receivership, reorganization, arrangement, dissolution or liquidation proceeding by or against any party hereto, or upon any party hereto making an assignment for the benefit of creditors or upon the holder of this note deeming itself insecure, then and in any such event, this note and all other obligations and liabilities, direct or contingent, of the parties hereto and each of them, to First Mississippi National Bank shall forthwith mature and become due and payable, without demand or notice, anything herein contained to the contrary notwithstanding.

All parties hereto, whether maker or endorser, hereby authorize and empower said Bank at any time to appropriate and apply to the payment and extinguishing hereof of and of any of the obligations or liabilities, direct or contingent, of the parties hereto, whether now existing or hereafter arising and whether then due or not due, any and all moneys, stocks, bonds, or other property of any [illegible] now or hereafter in the hands of said Bank on deposit or otherwise to the credit of or belonging to any party hereto, including any monies or other property in [illegible] said Bank for any purpose, such application, however, to be made only to the obligations or liabilities, direct or contingent, of the party or parties to whom [illegible] property belong, or for whom the same may be so on deposit or credited or to be credited. Any such application shall be at the option of the Bank. [illegible] such application to the payment of any such liabilities shall not affect the liability of any party hereto. Full power and authority are hereby given the said Bank to sell, assign and transfer all such stocks, bonds or property at public or private sale, at its option, without either demand, advertisement or notice of any kind, all of which are hereby expressly waived.

If this note be not paid at maturity, however such maturity be accomplished, and said note is placed in the hands of an attorney at law for collection, all parties hereto bind themselves to pay a reasonable attorney's fee to such attorney.

All parties hereto, whether maker or endorser, hereby severally waive presentment for payment, demand, notice of nonpayment, protest, notice of protest, and all other requirements necessary to hold each of them and agree that the payment hereof may be extended from time to time, one or more times, and that this note may be renewed from time to time all without notice and hereby bind themselves unconditionally and as original promisors and makers for the payment hereof, in principal, interest, costs and attorney's fees.

This note is negotiable and payable at any office of FIRST MISSISSIPPI NATIONAL BANK.

By
RENEWAL
AUG 2 1982
First Miss. National Bank

Address:
P.O. Drawer A
Biloxi, MS

Walter L. Nixon
Walter L. Nixon (Signature)
(Signature)
(Signature)

Note Number
8-2-82
When Due

FIRST MISSISSIPPI NATIONAL BANK
P. O. Box 70
Biloxi, MS 39533

WALTER L. NIXON, JR.
Customer #2108900

OAN #	DATE OF LOAN	AMOUNT OF LOAN	DUE DATE	INTEREST RATE	AMOUNT PAID		DATE	DATE RENEWED
					PRINCIPAL	INTEREST		
0531	5/8/81	$4,100.00	5/3/82	15.75* Floating		$ 166.76	5/21/82	5/28/82
						175.73	8/6/82	8/12/82
			8/2/82	16.50				
						148.00	11/2/82	
			11/10/82					

Paid in full 12-17-82 } WLN Spec acct
Ck# 2452 $4,443.36 } Peoples Bank of Biloxi
Note stamped "PAID DEC 21 1982"

(renewal date)

No. 2108900 Biloxi Mississippi November 1 19 82 $ 4,100.00

Ninety (90) days-- after date, for value received, the undersigned promise(s) to pay to FIRST MISSISSIPPI NATIONAL BANK, or order, the sum of:

Four Thousand One Hundred and no/100-- DOLLARS

with interest thereon at the rate of 14.50 per cent per annum from date until paid.

Upon the non-payment at any maturity of any of the obligations or [illegible] party hereto, or upon the suspension, failure or insolvency of any party hereto, or upon any application for or the commencement of any bankruptcy, insolvency, [illegible] reorganization, arrangement, dissolution or liquidation, proceeding by or against any party hereto, or upon any party hereto making an assignment for the benefit of creditors, or upon the holder of this note deeming itself insecure, then, and in any such event, this note and all other obligations and liabilities, direct or contingent, of the [illegible] note and each of them, to First Mississippi National Bank shall forthwith mature and become due and payable, without demand, notice [illegible] contained to the contrary notwithstanding.

All parties hereto, whether maker or endorser, hereby authorize the [illegible] at any time to appropriate and apply to the payment and extinguishing hereof and of any of the obligations or liabilities, direct or contingent, of any of the parties hereto, whether now existing or hereafter arising and whether then due or not due, any and all monies, stocks, bonds, or other property of any kind whatever now or hereafter in the hands of said Bank on deposit or otherwise to the credit of or belonging to any party hereto, including any monies or other property in transit to or from said Bank for any purpose, such application, however, to be made only to the obligations or liabilities, direct or contingent, of the party or parties to whom such monies or other property belong, or for whom the same may be on deposit or credited or to be credited. Any such application shall be at the option of the Bank, and failure to make any such application to the payment of any such liabilities shall not affect the liability of any party hereto. Full power and authority are hereby given the said Bank to sell, assign and transfer all such stocks, bonds or property at public or private sale, at its option, without either demand, advertisement or notice of any kind, all of which are hereby expressly waived.

If this note be not paid at maturity, however such maturity be accelerated, and said note is placed in the hands of an attorney at law for collection, all parties hereto bind themselves to pay a reasonable attorney's fee to such attorney.

All parties hereto, whether maker or endorser, hereby severally waive presentment for payment, demand, notice of nonpayment, protest, notice of protest, and all other requirements necessary to hold each of them and agree that the payment hereof may be extended from time to time, one or more times, and that this note may be renewed from time to time all without notice and hereby bind themselves [illegible] as original promisors and makers for the payment hereof, in principal, interest, costs and attorney's fees.

This note is negotiable and payable at any office of FIRST [illegible] NATIONAL BANK.

Address:
P. O. Drawer A
Biloxi, MS 39533

Walter L. Nixon Jr
Walter L. Nixon (Signature)
(Signature)
(Signature)

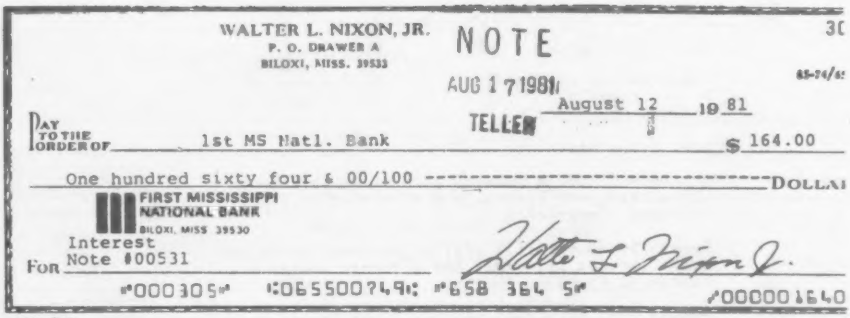
Note Number 531
When Due 1-31-83

For investment in Pattison Petroleum Corp. 5-8-81 $4,262.50

449

(2)

625



WALTER L. NIXON, JR.
P. O. DRAWER A
BILOXI, MISS. 39533

NOTE
AUG 17 1981
TELLER

3C

85-74/6

August 12 19 81

PAY TO THE ORDER OF 1st MS Natl. Bank $ 164.00

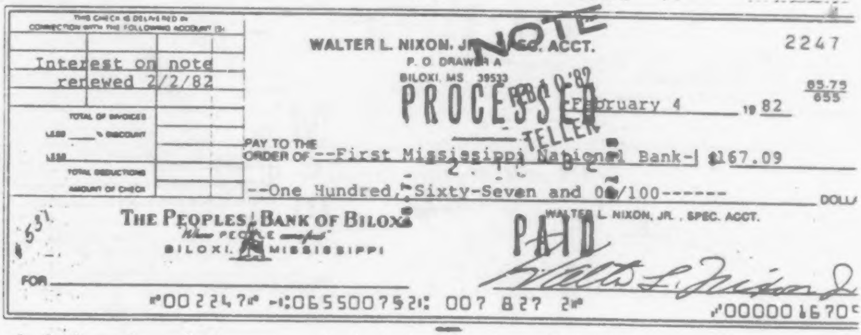
One hundred sixty four & 00/100 ------------------------------- DOLLA

FIRST MISSISSIPPI NATIONAL BANK
BILOXI, MISS 39530

FOR Interest Note #00531

Walter L. Nixon Jr.

⑈000305⑈ ⑆065500749⑆ ⑈658 364 5⑈ ⑈000001640



THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

Interest on note renewed 2/2/82

TOTAL OF INVOICES
LESS ___ % DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

WALTER L. NIXON, JR. SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

NOTE
PROCESSED
FEB 10 '82
TELLER

2247

85-75
655

February 4 19 82

PAY TO THE ORDER OF --First Mississippi National Bank-- $167.09

--One Hundred, Sixty-Seven and 09/100------ DOLLA

THE PEOPLES BANK OF BILOXI
BILOXI, MISSISSIPPI

#531

WALTER L. NIXON, JR., SPEC. ACCT.

PAID

Walter L. Nixon Jr.

FOR

⑈002247⑈ ⑆065500752⑆ 007 827 2⑈ ⑈0000016709

(26)

First Mississippi National Bank

October 12, 1981

WILLIAM A. PITTMAN
PRESIDENT
GULF COAST DIVISION

Judge Walter L. Nixon, Jr.
P. O. Drawer A
Biloxi, MS. 39533

Dear Judge Nixon:

I have enclosed a renewal note of which I would appreciate your signing and returning at your earliest convenience.

Hopefully, our little well will start paying off soon, so this principal and interest won't be a burden to you much longer.

Please give me a call anytime I can be of assistance.

Sincerely,

Bill

W. A. Pittman

WAP:ba
Enclosures

#00740

renewed for 90 days

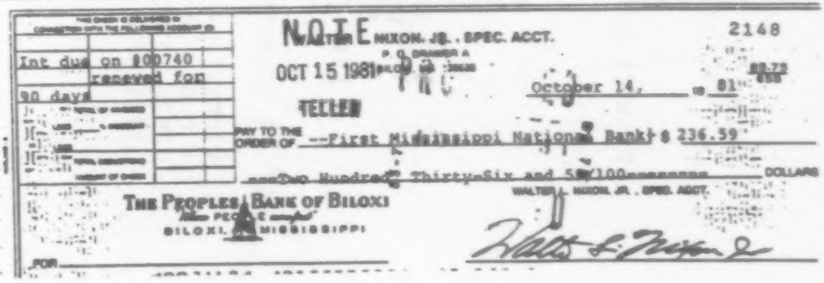
Memo

TO
Walter L. Nixon, Jr.
Please complete the attached note and return with a check for $236.59 covering:
$ ______ Principal
$ 236.59 Interest
$ ______ Insurance
Thanks for banking with us

#2148

W. A' Pittman
FIRST MISSISSIPPI NATIONAL BANK

POST OFFICE BOX 70. BILOXI, MISSISSIPPI 39533



Int due on #00740 renewed for 90 days

NOTE

WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

OCT 15 1981
TELLER

2148

October 14, 19 81

PAY TO THE ORDER OF --First Mississippi National Bank-- $ 236.59

---Two Hundred Thirty-Six and 59/100--------- DOLLARS

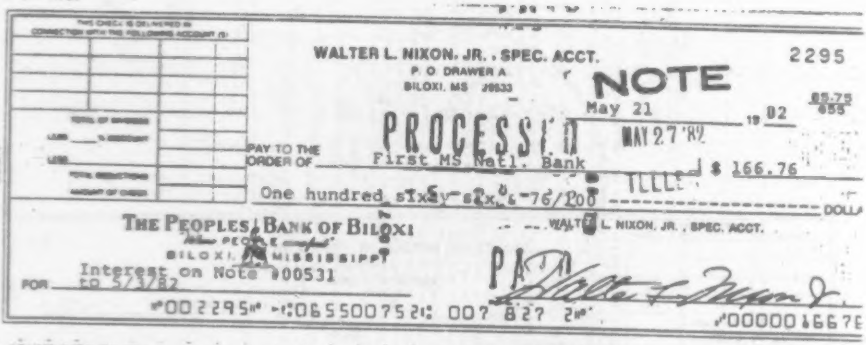
THE PEOPLES BANK OF BILOXI
BILOXI, MISSISSIPPI

WALTER L. NIXON, JR., SPEC. ACCT.

Walter L. Nixon Jr

FOR

(27



THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

TOTAL OF INVOICES
LESS ___% DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

2295

NOTE

May 21 19 82

85-75/655

PROCESSED

MAY 27 '82

PAY TO THE ORDER OF First MS Natl. Bank $ 166.76

TELLER

One hundred sixty-six & 76/100 ---------------------- DOLLA

THE PEOPLES BANK OF BILOXI
Where PEOPLE count
BILOXI, MISSISSIPPI

WALTER L. NIXON, JR., SPEC. ACCT.

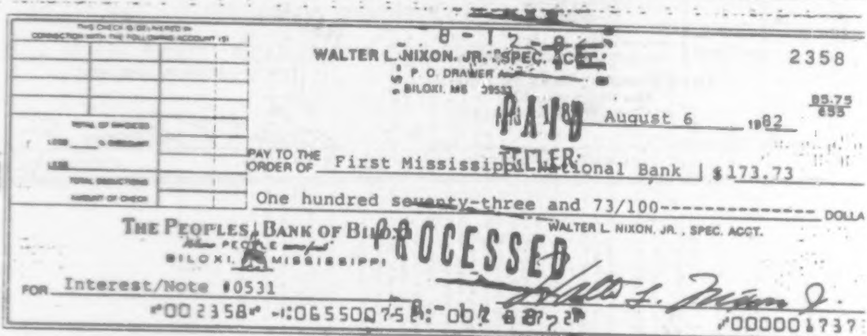
PAID

FOR Interest on Note #00531 to 5/3/82

Walter L. Nixon Jr.

⑈002295⑈ ⑆065500752⑆ 007 827 2⑈

⑈00000166 7E



THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

TOTAL OF INVOICES
LESS ___% DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

8-12-82

WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

2358

NOTE

PAID

August 6 19 82

85-75/655

TELLER

PAY TO THE ORDER OF First Mississippi National Bank $ 173.73

One hundred seventy-three and 73/100--------------- DOLLA

THE PEOPLES BANK OF BILOXI
Where PEOPLE count
BILOXI, MISSISSIPPI

PROCESSED

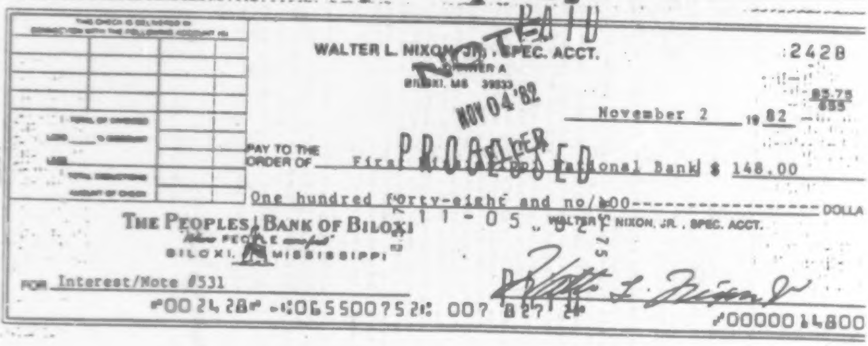
WALTER L. NIXON, JR., SPEC. ACCT.

FOR Interest/Note #0531

Walter L. Nixon Jr.

⑈002358⑈ ⑆065500752⑆ 007 827 2⑈

⑈00000173 7



THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

TOTAL OF INVOICES
LESS ___% DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

PAID

WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

NOTE

2428

NOV 04 '82

November 2 19 82

85-75/655

PROCESSED

TELLER

PAY TO THE ORDER OF First Mississippi National Bank $ 148.00

One hundred forty-eight and no/100---------------- DOLLA

11-05-82

THE PEOPLES BANK OF BILOXI
Where PEOPLE count
BILOXI, MISSISSIPPI

WALTER L. NIXON, JR., SPEC. ACCT.

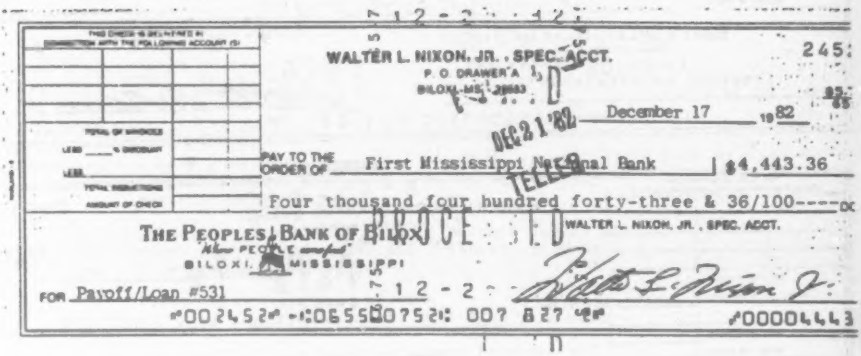
FOR Interest/Note #531

Walter L. Nixon Jr.

⑈002428⑈ ⑆065500752⑆ 007 827 2⑈

⑈0000014800

(28



THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

TOTAL OF INVOICES
LESS ____% DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

245

December 17 19 82

DEC 21 '82

PAY TO THE ORDER OF First Mississippi National Bank $4,443.36

TELLER

Four thousand four hundred forty-three & 36/100----

THE PEOPLES BANK OF BILOXI
"Where PEOPLE count"
BILOXI, MISSISSIPPI

WALTER L. NIXON, JR., SPEC. ACCT.

Walter L. Nixon Jr.

FOR Payoff/Loan #531

⑈002452⑈ ⑆065500752⑆ 007 827 4⑈ ⑈00004443

2108900-1098
E.D.P. No. ____ Biloxi ____ Mississippi ____ March 1 ____ 19 82 ____ $ 3,500.00

Ninety (90) days-- after date, for value received the undersigned promise(s) to pay to FIRST MISSISSIPPI NATIONAL BANK, or order, the sum of

Three Thousand Five Hundred and 00/100-- DOLLARS

with interest thereon at the rate of 16.50 per cent per annum from date until paid.

Upon the non-payment at any maturity of any of the obligations or liabilities of any party hereto, or upon the suspension, failure or insolvency of any party hereto, or upon any application for or the commencement of any bankruptcy, insolvency, receivership, reorganization, arrangement, dissolution or liquidation proceeding by or against any party hereto, or upon any party hereto making an assignment for the benefit of creditors, or upon the holder of this note deeming itself insecure, then and in any such event, this note and all other obligations and liabilities, direct or contingent, of the parties hereto and each of them, to First Mississippi National Bank shall forthwith mature and become due and payable, without demand, notice or putting default, anything herein contained to the contrary notwithstanding.

All parties hereto, whether maker or endorser, hereby authorize and empower said Bank at any time to appropriate and apply to the payment and extinguishing hereof and of any of the obligations or liabilities, direct or contingent, of any of the parties hereto, whether now existing or hereafter arising and whether then due or not due, any and all monies, stocks, bonds, or other property of any kind whatever now or hereafter in the hands of said Bank on deposit or otherwise to the credit of or belonging to any party hereto, including any monies or other property in transit to or from said Bank for any purpose, such application, however, to be made only to the obligations or liabilities, direct or contingent, of the party or parties to whom such monies or property belong, or for whom the same may be so on deposit or credited or to be credited. Any such application shall be at the option of the Bank, and failure to make any such application to the payment of any such liabilities shall not affect the liability of any party hereto. Full power and authority are hereby given the said Bank to sell, assign, transfer all such stocks, bonds or property at public or private sale, at its option, without either demand, advertisement or notice of any kind, all of which are hereby expressly waived.

If this note be not paid at maturity, however such maturity be occasioned, and this note is placed in the hands of an attorney at law for collection, all parties hereto bind themselves to pay a reasonable attorney's fee to such attorney.

All parties hereto, whether maker or endorser, hereby severally waive presentment for payment, demand, notice of nonpayment, protest, notice of protest, and all other requirements necessary to hold each of them and agree that the payment hereof may be extended from time to time, one or more times, and that this note may be renewed from time to time all without notice and hereby bind themselves unconditionally as original promisors and makers for the payment hereof, in principal, interest, costs and attorney's fees.

This note is negotiable and payable at any office of FIRST MISSISSIPPI NATIONAL BANK.

PAID BY RENEWAL
JUN 16 1982
FIRST MISSISSIPPI NATIONAL BANK

Address:
P. O. Drawer A
Biloxi, MS 39533
Open

Walter L. Nixon,
(Signature)

(Signature)

Note Number 1098
When Due 6-1-82

1800253

FIRST MISSISSIPPI NATIONAL BANK
FIRST MISSISSIPPI NATIONAL BANK, BILOXI
P O BOX 70
BILOXI, MS 39530

07/23/82 COMMERCIAL LOAN DEPARTMENT
218

PAYMENT NOTICE

1 2108900 00531 04 4,273.73

NIXON WALTER L JR 2108900

PAYMENT DUE	4,273.73
DUE DATE	08/02/82
NOTE NUMBER	00531
MATURITY	08/02/82
NOTE DATE	05/08/81
NEXT PAYMNT	08/02/82
PRINCIPAL BALANCE	4,100.00
PAYMENT CONSISTS OF	
PRINCIPAL	4,100.00
INTEREST	173.73
LATE CHARGE	0.00
INTEREST RATE	17.000000
PAST DUE	0.00
TOTAL DUE	4,273.73

DEAR CUSTOMER,
OUR RECORDS INDICATE A PAYMENT IS DUE FOR THE NOTE(S) DESCRIBED HEREIN. PLEASE INCLUDE THIS NOTICE WITH YOUR PAYMENT.

WALTER L NIXON JR
P O DRAWER A
BILOXI MS 39533

Interest pd
8/6/82 ck #2358
WLN Spec acct

CURRENT DUE 4,273.73 TOTAL DUE 4,273.73

FIRST MISSISSIPPI NATIONAL BANK 374-3611 10/22/82 COMMERCIAL LOAN DEPARTMENT
FIRST MISSISSIPPI NATIONAL BANK, BILOXI 218
P O BOX 70
BILOXI, MS 39530

Sherry Martin

PAYMENT NOTICE

NIXON WALTER L JR 2108900

1 2108500 00531 84 4,248.00

PAYMENT DUE	4,248.00
DUE DATE	11/01/82
NOTE NUMBER	00531
MATURITY	11/01/82
NOTE DATE	05/08/81
NEXT PAYMNT	11/01/82
PRINCIPAL BALANCE	4,100.00
PAYMENT CONSISTS OF	
PRINCIPAL	4,100.00
INTEREST	148.00
LATE CHARGE	0.00
INTEREST RATE	13.500000
PAST DUE	0.00
TOTAL DUE	4,248.00

DEAR CUSTOMER,
OUR RECORDS INDICATE A PAYMENT IS DUE FOR THE NOTE(S) DESCRIBED HEREIN. PLEASE INCLUDE THIS NOTICE WITH YOUR PAYMENT.

WALTER L NIXON JR
P O DRAWER A
BILOXI MS 39533

pd 11/2/82
ck# 2428 WLN spec acct

CURRENT DUE 4,248.00 TOTAL DUE 4,248.00

2108900-1098
E.D.P. No. ______ Biloxi, Mississippi December 1, 19 81 $ 3,500.00

Ninety (90) days after date, for value received, the undersigned promise(s) to pay to FIRST MISSISSIPPI NATIONAL BANK, or order, the sum of Three Thousand Five Hundred and 00/100 DOLLARS with interest thereon at the rate of 16.00 per cent per annum from date until paid.

Upon the non-payment at any maturity of any of the obligations or liabilities of any party hereto, or upon the suspension, failure or insolvency of any party hereto, or upon any application for or the commencement of any bankruptcy, insolvency, receivership, reorganization, arrangement, dissolution or liquidation proceedings by or against any party hereto, or upon any party hereto making an assignment for the benefit of creditors, or upon the holder of this note deeming itself insecure, then and in any such event, this note and all other obligations and liabilities, direct or contingent, of the parties hereto and each of them, to First Mississippi National Bank shall forthwith mature and become due and payable, without demand, notice or putting default, anything herein contained to the contrary notwithstanding.

All parties hereto, whether maker or endorser, hereby authorize and empower said Bank at any time to appropriate and apply to the payment and extinguishing hereof and of any of the obligations or liabilities, direct or contingent, of any of the parties hereto, whether now existing or hereafter arising and whether then due or not due, any and all monies, stocks, bonds, or other property of any kind whatever now or hereafter in the hands of said Bank on deposit or otherwise to the credit of or belonging to any party hereto, including any monies or other property in transit to or from said Bank for any purpose, such application, however, to be made only to the obligations or liabilities, direct or contingent, of the party or parties to whom such monies or other property belong, or for whom the same may be on deposit or credited or to be credited. Any such application shall be at the option of the Bank, and failure to make any such application to the payment of any such liability shall not affect the liability of any party hereto. Full power and authority are hereby given the said Bank to sell, assign and transfer all such stocks, bonds [illegible] at public or private sale, at its option, without either demand, advertisement or notice of any kind, all of which are hereby expressly waived.

If this note be not paid at maturity, however such maturity be occasioned, and said note is placed in the hands of an attorney at law for collection, all parties hereto bind themselves to pay a reasonable attorney's fee to such attorney.

All parties hereto, whether maker or endorser, hereby severally waive presentment for payment, demand, notice of nonpayment, protest, notice of protest, and all other requirements necessary to hold each of them and agree that the payment hereof may be extended from time to time, one or more times, and that this note may be renewed from time to time all without notice and hereby bind themselves unconditionally and as original promisors and makers for the payment hereof, in principal, interest, costs and attorney's fees.

This note is negotiable and payable at any office of FIRST MISSISSIPPI NATIONAL BANK.

PAID BY RENEWAL
[illegible] 1982
First Miss. National Bank
[illegible] Miss.

Address:
P. O. Drawer A
Biloxi, MS 39533
Opm

Walter L. Nixon, Jr.
Walter L. Nixon, Jr. (Signature)
(Signature)
(Signature)

Note Number
3-1-82
When Due

E.D.P. No. 2108900-1098 Biloxi Mississippi June 11 19 82 KMP 41 $ 3,500.00

Ninety (90) days after date, for value received, the undersigned promise(s) to pay to FIRST MISSISSIPPI NATIONAL BANK, or order, the sum of:

Three Thousand Five Hundred and 00/100 DOLLARS

with interest thereon at the rate of 16.50 per cent per annum from date until paid.

Upon the non-payment at any maturity of any of the obligations or liabilities of any party hereto, or upon the suspension, failure or insolvency of any party hereto, or upon any application for or the commencement of any bankruptcy, insolvency, receivership, reorganization, arrangement, dissolution or liquidation proceeding by or against any party hereto, or upon any party hereto making an assignment for the benefit of creditors, or upon the holder of this note deeming itself insecure, then and in any such event, this note and all other obligations and liabilities, direct or contingent, of the parties hereto and each of them to First Mississippi National Bank shall forthwith mature and become due and payable, without demand, notice or putting default, anything herein contained to the contrary notwithstanding.

All parties hereto, whether maker or endorser, hereby authorize and empower said Bank at any time to appropriate and apply to the payment and extinguishing hereof and of any of the obligations or liabilities, direct or contingent, of any of the parties hereto, whether now existing or hereafter arising and whether then due or not due, any and all monies, stocks, bonds, or other property of any kind whatever now or hereafter in the hands of said Bank on deposit or otherwise to the credit of or belonging to any party hereto, including any monies or other property in transit to or from said Bank for any purpose, such application, however, to be made only to the obligations or liabilities, direct or contingent, of the party or parties to whom such monies or other property belong, or in whose name they may be so on deposit or credited or to be credited. Any such application shall be at the option of the Bank, and failure to make any such application to the payment of any such liabilities shall not affect the liability of any party hereto. Full power and authority are hereby given the said Bank to sell, assign and transfer all such stocks, bonds or property at public or private sale, at its option, without either demand, advertisement or notice of any kind, all of which are hereby expressly waived.

If this note be not paid at maturity, however such maturity be occasioned, and said note is placed in the hands of an attorney at law for collection, all parties hereto bind themselves to pay a reasonable attorney's fee to such attorney.

All parties hereto, whether maker or endorser, hereby severally waive presentment for payment, demand, notice of non-payment, protest, notice of protest, and all other requirements necessary to hold each of them and agree that the payment hereof may be extended from time to time, one or more times, and that this note may be renewed from time to time all without notice and hereby bind themselves unconditionally [illegible] for the payment hereof, in principal, interest, costs and attorney's fees.

This note is negotiable and payable at any office of FIRST MISSISSIPPI NATIONAL BANK.

RENEWAL
SEP 16 1982
National Bank
[illegible]
MISS.

Address:

P. O. Drawer A

Biloxi, MS 39533

Open

Walter L Nixon Jr.
Walter L. Nixon, Jr. (Signature)

(Signature)

(Signature)

9-9-82
Note Number
When Due

[illegible]

FIRST MISSISSIPPI NATIONAL BANK
P. O. Box 70
Biloxi, MS 39533

WALTER L. NIXON, JR.
Customer #2108900

LOAN #	DATE OF LOAN	AMOUNT OF LOAN	DUE DATE	INTEREST RATE	AMOUNT PAID		DATE	DATE RENEWED
					PRINCIPAL	INTEREST		
01098	8-13-81	~~$3,500.00~~	~~6/1/82~~			$ 140.24	3/9/82	3/17/82
				16.5		$ 147.47	6/11/82	6/16/82
						$ 160.18	9-13-82	9-16-82

pd in full 12-17-82 Ck# 2454 $3,642.72 } WLN Special Acct Peoples Bank of Biloxi

---

Renewal date

Cust. No. 2108900 Biloxi, Mississippi September 9, 19 82 $ 3,500.00

Ninety (90) days after date, for value received, the undersigned promise(s) to pay to FIRST MISSISSIPPI NATIONAL BANK, or order, the sum of

Three Thousand Five Hundred and no/100 DOLLARS

with interest thereon at the rate of 15.00 per cent per annum from date until paid.

[illegible]

[illegible]

[illegible]

[illegible]

This note is negotiable and payable at any office of FIRST MISSISSIPPI NATIONAL BANK.

FIRST MISSISSIPPI NATIONAL BANK PAID BILOXI

Address:
P. O. Drawer A
Biloxi, MS 39533

Walter L. Nixon Jr
Walter L. Nixon, Jr.

Note Number 1098
When Due 12-8-82

Note stamped PAID DEC 21 1982

For investment in Pattison Petroleum Corp. 8/14/81 $2,189.50

(3)

FIRST MISSISSIPPI NATIONAL BANK
FIRST MISSISSIPPI NATIONAL BANK, BILOXI
P O BOX 70
BILOXI, MS 39530

02/19/82 COMMERCIAL LOAN DEPARTMENT
218

PAYMENT NOTICE

NIXON WALTER L JR 2108900

PAYMENT DUE	3,640.24
DUE DATE	03/01/82
NOTE NUMBER	01098
MATURITY	03/01/82
NOTE DATE	08/13/81
NEXT PAYMNT	03/01/82
PRINCIPAL BALANCE	3,500.00
PAYMENT CONSISTS OF	
PRINCIPAL	3,500.00
INTEREST	140.24
LATE CHARGE	0.00
INTEREST RATE	16.000000
PAST DUE	0.00
TOTAL DUE	3,640.24

1 2108900 01098 84 3,640.24

DEAR CUSTOMER,

OUR RECORDS INDICATE A PAYMENT IS DUE FOR THE NOTE(S) DESCRIBED HEREIN. PLEASE INCLUDE THIS NOTICE WITH YOUR PAYMENT.

WALTER L NIXON JR
P O DRAWER A
BILOXI MS 39533

pd $140.24
3-9-82
ck # 2261
Spec acct
PBB

CURRENT DUE 3,640.24 TOTAL DUE 3,640.24

FIRST MISSISSIPPI NATIONAL BANK
FIRST MISSISSIPPI NATIONAL BANK, BILOXI
P O BOX 70
BILOXI, MS 39533

05/21/82 COMMERCIAL LOAN DEPARTMENT
218

PAYMENT NOTICE

NIXON WALTER L JR 2108900

1 2108900 01098 84 3,647.47

PAYMENT DUE	3,647.47
DUE DATE	06/01/82
NOTE NUMBER	01098
MATURITY	06/01/82
NOTE DATE	08/13/81
NEXT PAYMNT	06/01/82
PRINCIPAL BALANCE	3,500.00
PAYMENT CONSISTS OF	
PRINCIPAL	3,500.00
INTEREST	147.47
LATE CHARGE	0.00
INTEREST RATE	16.500000
PAST DUE	0.00
TOTAL DUE	3,647.47

DEAR CUSTOMER,
OUR RECORDS INDICATE A PAYMENT IS DUE FOR THE NOTE(S) DESCRIBED HEREIN. PLEASE INCLUDE THIS NOTICE WITH YOUR PAYMENT.

WALTER L NIXON JR
P O DRAWER A
BILOXI MS 39533

Interest pd 6-11-82 PBB Spec Acct # 2322

CURRENT DUE 3,647.47 TOTAL DUE 3,647.47

FIRST MISSISSIPPI NATIONAL BANK
FIRST MISSISSIPPI NATIONAL BANK, BILOXI
P O BOX 70
BILOXI, MS 39530

11/26/82 COMMERCIAL LOAN DEPARTMENT
218

PAYMENT NOTICE

NIXON WALTER L JR 2108900

1 2108900 01098 84 3,629.76

PAYMENT DUE	3,629.76
DUE DATE	12/08/82
NOTE NUMBER	01098
MATURITY	12/08/82
NOTE DATE	08/13/81
NEXT PAYMNT	
PRINCIPAL BALANCE	3,500.00
PAYMENT CONSISTS OF	
PRINCIPAL	3,500.00
INTEREST	129.76
LATE CHARGE	0.00
INTEREST RATE	15.000000
PAST DUE	0.00
TOTAL DUE	3,629.76

DEAR CUSTOMER,
OUR RECORDS INDICATE A PAYMENT IS DUE FOR THE NOTE(S) DESCRIBED HEREIN. PLEASE INCLUDE THIS NOTICE WITH YOUR PAYMENT.

WALTER L NIXON JR
P O DRAWER A
BILOXI MS 39533

$3,642.72 ✓
Pd 12/17/82 ✓
ck#2454 Property Bank acct

CURRENT DUE 3,629.76 TOTAL DUE 3,629.76

464

FIRST MISSISSIPPI NATIONAL BANK
FIRST MISSISSIPPI NATIONAL BANK, BILOXI
P O BOX 70
BILOXI, MS 39530

08/30/82 COMMERCIAL LOAN DEPARTMENT
218

PAYMENT NOTICE

NIXON WALTER L JR 2108900

1 2108900 01098 04 3,660.18

PAYMENT DUE	3,660.18
DUE DATE	09/09/82
NOTE NUMBER	01098
MATURITY	09/09/82
NOTE DATE	06/13/81
NEXT PAYMNT	09/09/82
PRINCIPAL BALANCE	3,500.00
PAYMENT CONSISTS OF	
PRINCIPAL	3,500.00
INTEREST	160.18
LATE CHARGE	0.00
INTEREST RATE	16.500000
PAST DUE	0.00
TOTAL DUE	3,660.18

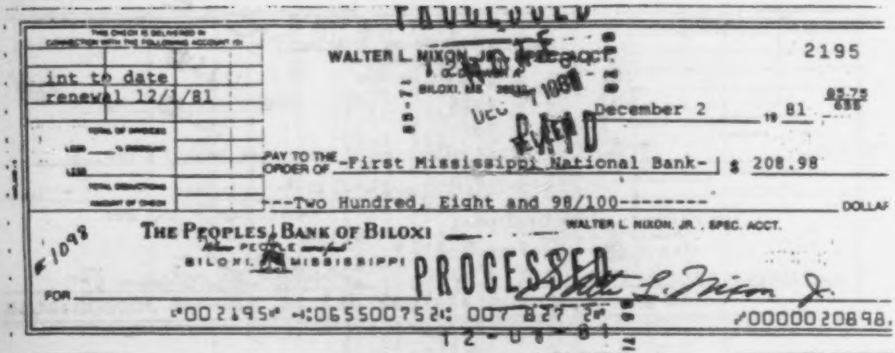
DEAR CUSTOMER,

OUR RECORDS INDICATE A PAYMENT IS DUE FOR THE NOTE(S) DESCRIBED HEREIN. PLEASE INCLUDE THIS NOTICE WITH YOUR PAYMENT.

WALTER L NIXON JR
P O DRAWER A
BILOXI MS 39533

pd [illegible] 9/13/82
ck# 2384
WVN Spec acct

CURRENT DUE 3,660.18 TOTAL DUE 3,660.18



WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

2195

int to date
renewal 12/1/81

December 2 19 81 $\frac{85\text{-}75}{655}$

PAY TO THE ORDER OF -First Mississippi National Bank- $ 208.98

--Two Hundred, Eight and 98/100-------- DOLLARS

THE PEOPLES BANK OF BILOXI
BILOXI, MISSISSIPPI

#1098

WALTER L. NIXON, JR., SPEC. ACCT.

FOR

Walter L. Nixon Jr.

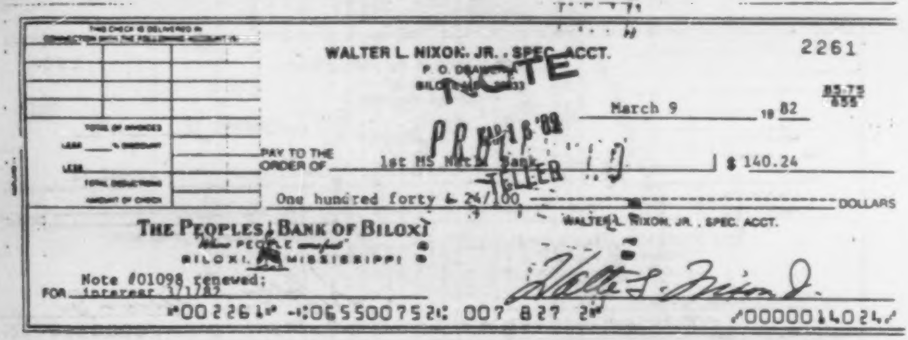
002195 065500752 007 827 2 0000020898

PAID

PROCESSED

DEC 7 1981

12-08-81



WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

2261

March 9 19 82 $\frac{85\text{-}75}{655}$

PAY TO THE ORDER OF 1st MS Natl Bank $ 140.24

One hundred forty & 24/100 ---------------------------- DOLLARS

THE PEOPLES BANK OF BILOXI
BILOXI, MISSISSIPPI

WALTER L. NIXON, JR., SPEC. ACCT.

FOR Note #01098 renewed; interest 3/1/82

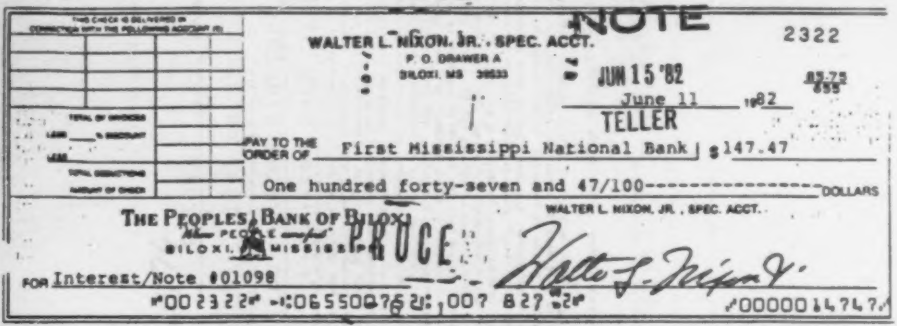
Walter L. Nixon Jr.

002261 065500752 007 827 2 0000014024

NOTE

MAR 16 '82

TELLER



NOTE

WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

2322

JUN 15 '82

TELLER

June 11 19 82 $\frac{85\text{-}75}{655}$

PAY TO THE ORDER OF First Mississippi National Bank $ 147.47

One hundred forty-seven and 47/100---------------- DOLLARS

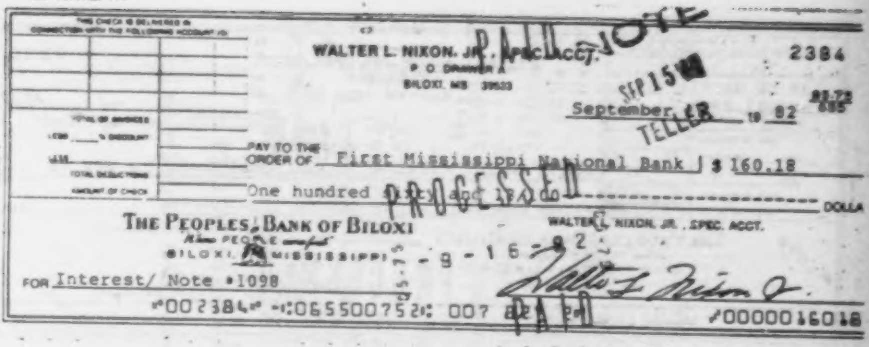
THE PEOPLES BANK OF BILOXI
BILOXI, MISSISSIPPI

WALTER L. NIXON, JR., SPEC. ACCT.

FOR Interest/Note #01098

Walter L. Nixon Jr.

002322 065500752 007 827 2 0000014747



THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

TOTAL OF INVOICES
LESS ____% DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

2384

September 13 19 82

PAY TO THE ORDER OF First Mississippi National Bank $ 160.18

One hundred sixty and 18/100 DOLLARS

THE PEOPLES BANK OF BILOXI
Where PEOPLE count
BILOXI, MISSISSIPPI

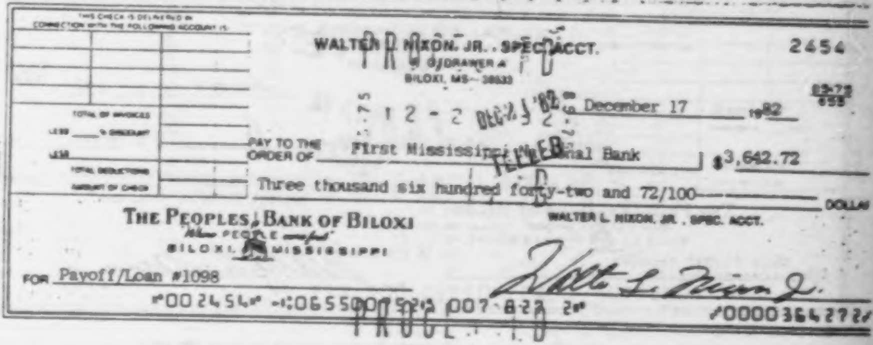
WALTER L. NIXON, JR., SPEC. ACCT.

Walter L. Nixon Jr.

FOR Interest/ Note #1098

⑈002384⑈ ⑆065500752⑆ 007 822 2⑈ ⑈0000016018

PAID NOTE
SEP 15 '82
TELLER
PROCESSED
9-16-82
PAID



THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

TOTAL OF INVOICES
LESS ____% DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

2454

December 17 1982

PAY TO THE ORDER OF First Mississippi National Bank $3,642.72

Three thousand six hundred forty-two and 72/100 DOLLARS

THE PEOPLES BANK OF BILOXI
Where PEOPLE count
BILOXI, MISSISSIPPI

WALTER L. NIXON, JR., SPEC. ACCT.

Walter L. Nixon Jr.

FOR Payoff/Loan #1098

⑈002454⑈ ⑆065500752⑆ 007 822 2⑈ ⑈0000364272⑈

12-2
DEC 21 '82
TELLER
PAID
PROCESSED

2118900 -1576

E.D.P. No. ________ Biloxi, Mississippi November 4, 19 81 N $10,985.00

One Hundred Eighty (180) days------------------- after date, for value received, the undersigned promise(s) to pay to FIRST MISSISSIPPI NATIONAL BANK, or order, the sum of:

Ten Thousand Nine Hundred Eighty-Five and 00/100-------------------------- DOLLARS

with interest thereon at the rate of 17.50*see back of note per cent per annum from date until paid.

Upon the non-payment at any maturity of any of the obligations or liabilities of any party hereto, or upon the suspension, failure or insolvency of any party hereto, or upon any application for or the commencement of any bankruptcy, insolvency, receivership, reorganization, arrangement, dissolution or liquidation proceeding by or against any party hereto, or upon any party hereto making an assignment for the benefit of creditors, or upon the holder of this note deeming itself insecure, then and in any such event, this note and all other obligations and liabilities, direct or contingent, of the parties hereto, and each of them, to First Mississippi National Bank shall forthwith mature and become due and payable, without demand, notice or putting default, anything herein [illegible] the contrary notwithstanding.

All parties hereto, whether maker or endorser, hereby authorize and empower said Bank at [illegible] and apply to the payment and extinguishing hereof and of any of the obligations or liabilities, direct or contingent, of any of the parties hereto, whether [illegible] or hereafter arising and whether then due or not due, any and all monies, stocks, bonds, or other property of any kind whatever now or hereafter [illegible] Bank on deposit or otherwise to the credit of or belonging to any party hereto, including any monies or other property in transit to or from said Bank for any purpose, [illegible] application, however, to be made only to the obligations or liabilities, direct or contingent, of the party or parties to whom such monies or other property belongs, [illegible] the same may be so on deposit or credited or to be credited. Any such application shall be at the option of the Bank, and failure to make any such application to the payment of any such liabilities shall not affect the liability of any party hereto. Full power and authority are hereby given the said Bank to sell, assign and surrender all such stocks, bonds or property at public or private sale, at its option, without other demand, advertisement or notice of any kind, all of which are hereby expressly waived.

If this note be not paid at maturity, however such maturity be occasioned, and said note be placed in the hands of an attorney at law for collection, all parties hereto bind themselves to pay a reasonable attorney's fee to such attorney.

All parties hereto, whether maker or endorser, hereby severally waive presentment for payment, demand, notice of nonpayment, protest, notice of protest, and all other requirements necessary to hold each of them and agree that the payment hereof may be extended from time to time, one or more times, and that this note may be renewed from time to time all without notice and hereby bind themselves unconditionally and as original promisors and makers for the payment hereof, in principal, interest, costs and attorney's fees.

This note is negotiable and payable at any office of FIRST MISSISSIPPI NATIONAL BANK.

Address:
P. O. Drawer A
Biloxi, MS 39533
Open

Walter L. Nixon
Walter L. Nixon [illegible]
1576
(Signature)

(Signature)

Note Number
5-3-82
When Due

2108900-1576

E.D.P. No. ______ Biloxi, Mississippi May 3, 19 82 WBP $10,985.00

Ninety (90) days-- after date, for value received, the undersigned promise(s) to pay to FIRST MISSISSIPPI NATIONAL BANK, or order, the sum of:

Ten Thousand Nine Hundred Eighty-Five and 00/100-- DOLLARS

with interest thereon at the rate of 17.00 per cent per annum from date until paid.

Upon the non-payment [illegible] at maturity of any of the obligations or liabilities of any party hereto, or upon the suspension, failure or insolvency of any party hereto, or upon any application [illegible] commencement of any bankruptcy, insolvency, receivership, reorganization, arrangement, dissolution or liquidation proceeding by or against any party hereto [illegible] making an assignment for the benefit of creditors, or upon the holder of this note deeming itself insecure, then and in any such event, this note and all other [illegible] and liabilities, direct or contingent, of the parties hereto and each of them, to First Mississippi National Bank shall forthwith mature and become due and payable without demand, notice or putting default, anything herein contained to the contrary notwithstanding.

All parties hereto, [illegible] hereby authorize and empower said Bank at any time to appropriate and apply to the payment and extinguishing hereof and of any of the [illegible] direct or contingent, of any of the parties hereto, whether now existing or hereafter arising and whether then due or not due, any and all monies, stocks, bonds, or other property of any kind whatever now or hereafter in the hands of said Bank on deposit or otherwise to the credit of or belonging to any party hereto, including any monies or other property in transit to or from said Bank for any purpose, such application, however, to be made only to the obligations or liabilities, direct or [illegible] party or parties to whom such monies or other property belong, or for whom the same may be so on deposit or credited or to be credited. Any such application [illegible] the option of the Bank, and failure to make any such application to the payment of any such liabilities shall not affect the liability of any party hereto. Full power and authority are hereby given the said Bank to sell, assign and transfer all such stocks, bonds or property at public or private sale, at its option, without [illegible] notice of any kind, all of which are hereby expressly waived.

If this [illegible] such maturity be occasioned, and said note is placed in the hands of an attorney at law for collection, all parties hereto bind themselves [illegible] attorney's fee to such attorney.

All parties hereto, whether maker or endorser, hereby severally waive presentment for payment, demand, notice of nonpayment, protest, notice of protest, and all other requirements necessary [illegible] each of them and agree that the payment hereof may be extended from time to time, one or more times, and that this note may be renewed from time to time all without notice and hereby bind themselves unconditionally and as original promisors and makers for the payment hereof, in principal, interest, costs and attorney's fees.

This note is negotiable and payable at any office of FIRST MISSISSIPPI NATIONAL BANK.

Address:
P. O. Drawer E A
Biloxi, MS 39533

Walter L. Nixon, Jr.
(Signature)

(Signature)

(Signature)

Note Number

8-2-82
When Due

PAID
BY RENEWAL
AUG 12 1982
First Miss. National Bank

2108400-1574

E.D.P. No. ____________ Biloxi, Mississippi August 2 19 82 N R $10,985.00

Ninety (90) days-- after date, for value received, the undersigned promise(s) to pay to FIRST MISSISSIPPI NATIONAL BANK, or order, the sum of:

Ten Thousand Nine Hundred Eighty-Five and 00/100-- DOLLARS

with interest thereon at the rate of 16.50 per cent per annum from date until paid.

Upon the non-payment at any maturity of any of the obligations or liabilities of any party hereto, or upon the suspension, failure or insolvency of any party hereto, or upon any application for or the commencement of any bankruptcy, insolvency, receivership, reorganization, arrangement, dissolution or liquidation proceeding by or against any party hereto, or upon any party hereto making an assignment for the benefit of creditors, or upon the holder of this note deeming itself insecure, then and in any such event, this note and all other obligations and liabilities, direct or contingent, of the parties hereto and each of them, to First Mississippi National Bank shall forthwith mature and become due and payable, without demand, notice or putting default, anything herein contained to the contrary notwithstanding.

All parties hereto, whether maker or endorser, hereby authorize and empower said Bank at any time to appropriate and apply to the payment and extinguishing hereof and of any of the obligations or liabilities, direct or contingent, of any of the parties hereto, whether now existing or hereafter arising and whether then due or not due, any and all monies, stocks, bonds, or other property of any kind whatever now or hereafter in the hands of said Bank on deposit or otherwise to the credit of or belonging to any party hereto, including any monies or other property in transit to or from said Bank for any purpose, such application, however, to be made only to the obligations or liabilities, direct or contingent, of the party or parties to whom such monies or other property belong, or for whom the same may be on deposit or credited or to be credited. Any such application shall be at the option of the Bank, and failure to make any such application to the payment of any such liabilities shall not affect the liability of any party hereto. Full power and authority are hereby given the said Bank to sell, assign and transfer all such stocks, bonds or property at public or private sale, at its option, without either demand, advertisement or notice of any kind, all of which are hereby expressly waived.

If this note be not paid at maturity, however such maturity be occasioned, and said note is placed in the hands of an attorney at law for collection, all parties hereto bind themselves to pay a reasonable attorney's fee to such attorney.

All parties hereto, whether maker or endorser, hereby severally waive presentment for payment, demand, notice of non-payment, protest, notice of protest, and all other requirements necessary to hold each of them and agree that the payment hereof may be extended from time to time, one or more times, and that this note may be renewed from time to time all without notice and hereby bind themselves unconditionally and as original promisors and makers for the payment hereof, in principal, interest, costs and attorney's fees.

This note is negotiable and payable at any office of FIRST MISSISSIPPI NATIONAL BANK.

NOV 5 1982

Address:

P. O. Box 0

Biloxi, MS 39533

Open

Walter L. Nixon Jr.

Walter L. Nixon, Jr. (Signature)

(Signature)

(Signature)

Note Number

11.1.82

When Due

1866251

FIRST MISSISSIPPI NATIONAL BANK
FIRST MISSISSIPPI NATIONAL BANK, BILOXI
P O BOX 70
BILOXI, MS 39530

04/23/82 COMMERCIAL LOAN DEPARTMENT
218

PAYMENT NOTICE

1 2108500 01576 64 11,887.43

DEAR CUSTOMER,
OUR RECORDS INDICATE A PAYMENT IS DUE FOR THE NOTE(S) DESCRIBED HEREIN. PLEASE INCLUDE THIS NOTICE WITH YOUR PAYMENT.

WALTER L NIXON JR
P O DRAWER A
BILOXI MS 39533

Int. pd. 5-21-82
PBB Spec Acct.
CK #2294

NIXON WALTER L JR 2108900

PAYMENT DUE	11,887.43
DUE DATE	05/03/82
NOTE NUMBER	01576
MATURITY	05/03/82
NOTE DATE	11/04/81
NEXT PAYMNT	05/03/82
PRINCIPAL BALANCE	10,985.00
PAYMENT CONSISTS OF	
PRINCIPAL	10,985.00
INTEREST	902.43
LATE CHARGE	0.00
INTEREST RATE	16.500000

CURRENT DUE 11,887.43 TOTAL DUE 11,887.43

PAST DUE	0.00
TOTAL DUE	11,887.43

FIRST MISSISSIPPI NATIONAL BANK
FIRST MISSISSIPPI NATIONAL BANK, BILOXI
P O BOX 70
BILOXI, MS 39530

07/23/82 COMMERCIAL LOAN DEPARTMENT
218

PAYMENT NOTICE

NIXON WALTER L JR 2108900

1 2108900 01576 84 11,450.60

PAYMENT DUE	11,450.60
DUE DATE	08/02/82
NOTE NUMBER	01576
MATURITY	08/02/82
NOTE DATE	11/04/81
NEXT PAYMNT	08/02/82
PRINCIPAL BALANCE	10,985.00
PAYMENT CONSISTS OF	
PRINCIPAL	10,985.00
INTEREST	465.60
LATE CHARGE	0.00
INTEREST RATE	17.000000
PAST DUE	0.00
TOTAL DUE	11,450.60

DEAR CUSTOMER,

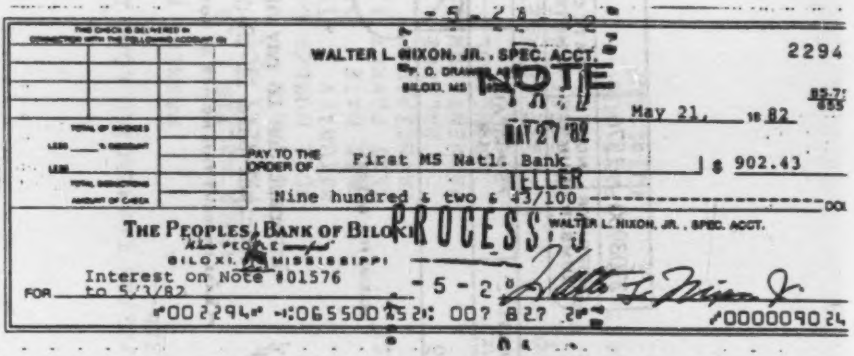
OUR RECORDS INDICATE A PAYMENT IS DUE FOR THE NOTE(S) DESCRIBED HEREIN. PLEASE INCLUDE THIS NOTICE WITH YOUR PAYMENT.

WALTER L NIXON JR
P O DRAWER A
BILOXI MS 39533

Interest pd 8/6/82 ck# 2357
WLN spec acct

CURRENT DUE 11,450.60 TOTAL DUE 11,450.60

(46)



THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

TOTAL OF INVOICES
LESS ___% DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER
BILOXI, MS

2294

85-7
655

NOTE

MAY 27 '82

TELLER

May 21, 1982

PAY TO THE ORDER OF First MS Natl. Bank $ 902.43

Nine hundred & two & 43/100 DOL

PROCESSED

5-2

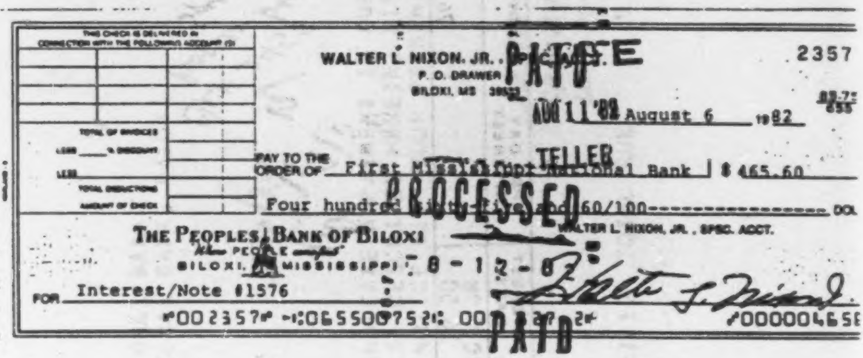
THE PEOPLES BANK OF BILOXI
"Where PEOPLE count"
BILOXI, MISSISSIPPI

WALTER L. NIXON, JR., SPEC. ACCT.

Walter L. Nixon Jr.

FOR Interest on Note #01576 to 5/3/82

⑈002294⑈ ⑆065500752⑆ 007 827 2⑈ ⑈0000090 24



THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

TOTAL OF INVOICES
LESS ___% DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER
BILOXI, MS 39533

2357

85-7
655

PAID

AUG 11 '82

TELLER

August 6 1982

PAY TO THE ORDER OF First Mississippi National Bank $ 465.60

Four hundred sixty-five and 60/100 DOL

PROCESSED

8-12-82

THE PEOPLES BANK OF BILOXI
"Where PEOPLE count"
BILOXI, MISSISSIPPI

WALTER L. NIXON, JR., SPEC. ACCT.

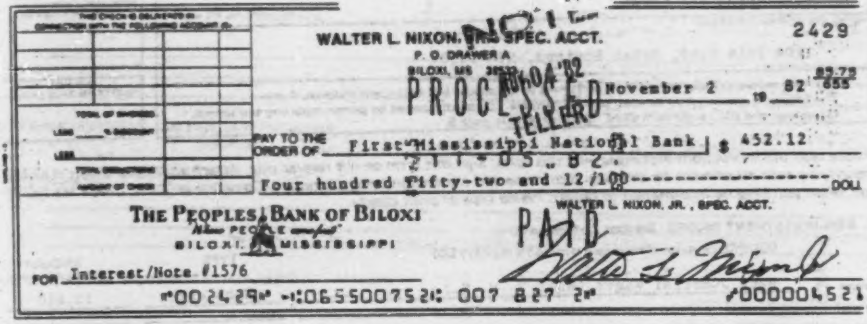
Walter L. Nixon

FOR Interest/Note #1576

⑈002357⑈ ⑆065500752⑆ 007 827 2⑈ ⑈00000465

PAID

(47)



THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

TOTAL OF INVOICES

LESS ___% DISCOUNT

LESS

TOTAL DEDUCTIONS

AMOUNT OF CHECK

WALTER L. NIXON, JR. SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

2429

NOV 04 '82
PROCESSED
TELLER D

November 2 19 82

85-75
655

PAY TO THE ORDER OF First Mississippi National Bank $ 452.12

2 1 1 - 0 5 - 8 2

Four hundred Fifty-two and 12/100------------------ DOLLARS

WALTER L. NIXON, JR., SPEC. ACCT.

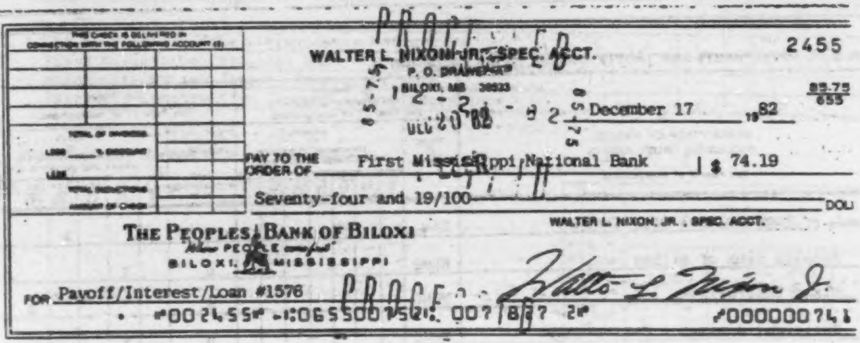
PAID

THE PEOPLES BANK OF BILOXI
BILOXI, MISSISSIPPI

FOR Interest/Note #1576

Walter L. Nixon Jr.

⑈002429⑈ ⑆065500752⑆ 007 827 2⑈ ⑈000004521



THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNT (S)

TOTAL OF INVOICES

LESS ___% DISCOUNT

LESS

TOTAL DEDUCTIONS

AMOUNT OF CHECK

PROCESSED

WALTER L. NIXON, JR., SPEC. ACCT.
P. O. DRAWER A
BILOXI, MS 39533

2455

85-75
12-21-82
DEC 20 82
85-75

December 17 19 82

85-75
655

PAY TO THE ORDER OF First Mississippi National Bank $ 74.19

Seventy-four and 19/100------------------ DOLLARS

WALTER L. NIXON, JR., SPEC. ACCT.

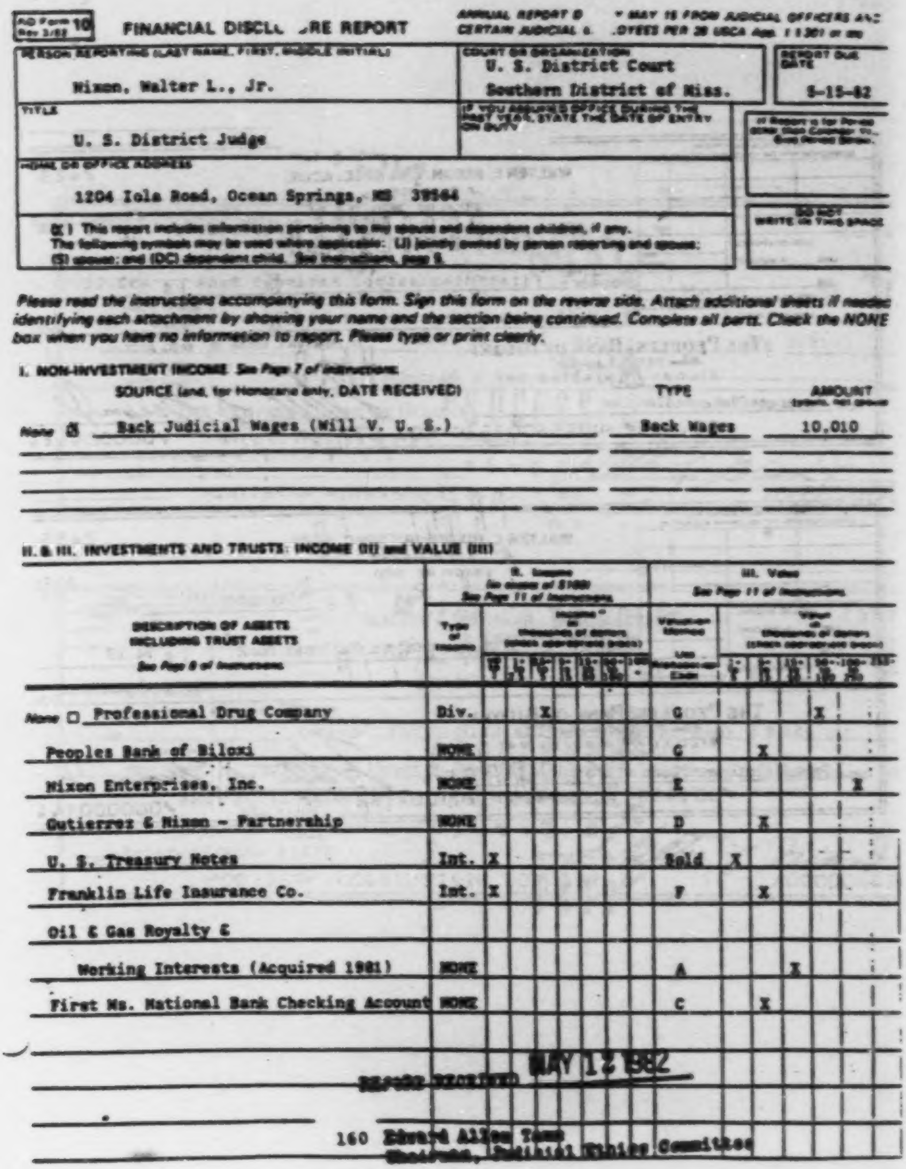
THE PEOPLES BANK OF BILOXI
BILOXI, MISSISSIPPI

FOR Payoff/Interest/Loan #1576

Walter L. Nixon Jr.

⑈002455⑈ ⑆065500752⑆ 007 827 2⑈ ⑈00000074

EXHIBIT 13



AO Form 10 Rev 3/82 **FINANCIAL DISCL[illegible]RE REPORT**

ANNUAL REPORT [illegible] MAY 15 FROM JUDICIAL OFFICERS AN[illegible] CERTAIN JUDICIAL [illegible]OYEES PER 28 USCA App. I § 301 et seq.

PERSON REPORTING (LAST NAME, FIRST, MIDDLE INITIAL): Nixon, Walter L., Jr.

COURT OR ORGANIZATION: U. S. District Court Southern District of Miss.

REPORT DUE DATE: 5-15-82

TITLE: U. S. District Judge

IF YOU ASSUMED OFFICE DURING THE PAST YEAR, STATE THE DATE OF ENTRY ON DUTY:

[illegible]

HOME OR OFFICE ADDRESS: 1204 Iola Road, Ocean Springs, MS 39564

DO NOT WRITE IN THIS SPACE

(X) This report includes information pertaining to my spouse and dependent children, if any. The following symbols may be used where applicable: (J) jointly owned by person reporting and spouse; (S) spouse; and (DC) dependent child. See instructions, page 5.

Please read the instructions accompanying this form. Sign this form on the reverse side. Attach additional sheets if neede[illegible] identifying each attachment by showing your name and the section being continued. Complete all parts. Check the NONE box when you have no information to report. Please type or print clearly.

I. NON-INVESTMENT INCOME *See Page 7 of instructions.*

SOURCE (and, for Honoraria only, DATE RECEIVED)	TYPE	AMOUNT
None ☐ Back Judicial Wages (Will V. U. S.)	Back Wages	10,010

II. & III. INVESTMENTS AND TRUSTS: INCOME (II) and VALUE (III)

DESCRIPTION OF ASSETS INCLUDING TRUST ASSETS *See Page 8 of Instructions*	II. Income *See Page 11 of Instructions* Type of Income	Income in Thousands of Dollars (check appropriate block) [illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	III. Value *See Page 11 of Instructions* Valuation Method Use [illegible] Code	Value in Thousands of Dollars (check appropriate block) [illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
None ☐ Professional Drug Company	Div.			X					G				X		
Peoples Bank of Biloxi	NONE								G		X				
Nixon Enterprises, Inc.	NONE								E					X	
Gutierrez & Nixon - Partnership	NONE								D		X				
U. S. Treasury Notes	Int.	X							Sold	X					
Franklin Life Insurance Co.	Int.	X							F		X				
Oil & Gas Royalty & Working Interests (Acquired 1981)	NONE								A			X			
First Ms. National Bank Checking Account	NONE								C		X				

RECORD RECEIVED MAY 12 1982

160 Edward Allen Tamm
Chairman, Judicial Ethics Committee

FINANC.AL DISCLOSURE REPC (Cont.) **PERSON REPORTIN ST NAME, FIRST, MIDDLE INITIAL)**

IV. GIFTS *None* ☒

A. Gifts of transportation, lodging, food, or entertainment. *See Page 13 of Instructions.*

SOURCE	DESCRIPTION

B. Other Gifts *See Page 14 of Instructions.*

		VALUE

V. REIMBURSEMENT *See Page 14 of Instructions.*

SOURCE	DESCRIPTION
None ☒	

VI. LIABILITIES *See Page 14 of Instructions.*

DESCRIPTION *(Include identity of Payee or Creditor)*	Amount in thousands of dollars			
None ☐	10+ to 15	15+ to 50	100+ to 250	250
The Mississippi Bank - Promissory Notes		X		
First Mississippi National Bank - Promissory Notes		X		
Nixon Enterprises, Inc. - Promissory Note		X		
Fairchild Construction Company - Promissory Note	X			

VII. TRANSACTIONS *See Page 15 & 16 of Instructions.*

DESCRIPTION	DATE	SALE	PURCHASE	EXCHANGE	Value in thousands of dollars					
					1+ to 5	5+ to 15	15+ to 50	50+ to 100	100+	250+
None ☐										
U. S. Treasury Notes	4-13-81		X		X					
U. S. Treasury Notes	11-30-81	X			X					

Judicial Ethics Committee
Judicial Conference
of the
United States

U.S. Courthouse
Room [illegible]
Washington, D.C. [illegible]

Alfred A. Arraj
John D. Butzner, Jr.
A. Sherman Christensen
[illegible]
Edward Thaxter Gignoux
Frank M. Johnson, Jr.
William Wayne Justice
Prentice H. Marshall
[illegible]
Edward Allen Tamm
(Chairman)

June 18, 1982

The Honorable Walter L. Nixon, Jr.
United States District Judge
1204 Iola Road
Ocean Springs, Mississippi 39564

My dear Judge Nixon:

In accord with its current practice, a member of the Judicial Ethics Committee has reviewed the Financial Disclosure Report submitted by you and makes the following observations:

> Parts II & III -- You reported oil and gas royalty and working interests. The identity of the lessees and the working interests should be disclosed. Please see pages 8 and 9 of the instructions.
>
> You indicated that you acquired these interests in 1981; consequently, their acquisition should be noted in Part VII -- Transactions -- along with the date of purchase and the identity of the other parties to the transaction. Please see page 15 of the instructions.

In replying to this letter, whether by an amended [illegible] answering by letter, you should be certain that a copy [illegible] response is also filed with the clerk of the court with [illegible] filed your original report.

Sincerely,

Edward Allen

Edward Allen Tamm
Chairman

EAT:amh

AMENDED REPORT

FINANCIAL DISCLOSURE REPORT

ANNUAL REPORT DUE BY MAY 15 FROM JUDICIAL OFFICERS AND CERTAIN JUDICIAL EMPLOYEES PER 28 USCA App. I § 301 et seq.

PERSON REPORTING (LAST NAME, FIRST, MIDDLE INITIAL) Nixon, Walter L., Jr.	COURT OR ORGANIZATION U. S. District Court Southern District of Miss.	REPORT DUE DATE 5-15-82
TITLE U. S. District Judge	IF YOU ASSUMED OFFICE DURING THE PAST YEAR, STATE THE DATE OF ENTRY ON DUTY	If Report is for Period other than Calendar Yr., Give Period Below:
HOME ADDRESS 1204 [illegible] Road, Ocean Springs, MS 39564		DO NOT WRITE IN THIS SPACE

(X) This report includes information pertaining to my spouse and dependent children, if any. The following symbols may be used where applicable: (J) jointly owned by person reporting and spouse; (S) spouse; and (DC) dependent child. See instructions, page 5.

Please read the instructions accompanying this form. Sign this form on the reverse side. Attach additional sheets if needed, identifying each attachment by showing your name and the section being continued. Complete all parts. Check the NONE box when you have no information to report. Please type or print clearly.

I. NON-INVESTMENT INCOME *See Page 7 of instructions.*

	SOURCE (and, for Honoraria only, DATE RECEIVED)	TYPE	AMOUNT (yours, not spouse's)
None ☐	Back Judicial Wages (Will v. U.S.)	Back Wages	10,010

REPORT RECEIVED
JUL - 6 1982
JUDICIAL ETHICS COMMITTEE

II. & III. INVESTMENTS AND TRUSTS. INCOME (II) and VALUE (III)

DESCRIPTION OF ASSETS INCLUDING TRUST ASSETS *See Page 8 of instructions.*	II. Income (in excess of $100) See Page 11 of Instructions. Type of Income	Income in thousands of dollars: up to 1	1-2.5	2.5-5	5-15	15-50	50-100	100+	III. Value See Page 11 of Instructions. Valuation Method Use Alphabetical Code	Value in thousands of dollars: 1-5	5-15	15-50	50-100	100-250	250+
None ☐ Professional Drug Company	Div			X					G				X		
Peoples Bank of Biloxi	NONE								G		X				
Nixon Enterprises, Inc.	NONE								E					X	
Gutierrez & Nixon - Partnership	NONE								D		X	[redacted]			
U.S. Treasury Notes	Int.	X							Sold	X		[redacted]			
Franklin Life Insurance Co.	Int.	X							F		X	[redacted]			
First Ms. National Bank Checking Acct.	NONE								C		X	[redacted]			
Oil & Gas Royalty Interest															
1. W.R. Fairchild Const. Co. LTD	NONE								A		X				
2. Geosouthern Energy Corp.	NONE								A		X	[redacted]			
3. Robert A. Stockett, Jr.	NONE								A		X	[redacted]			
4. Pattison Petroleum Corp.	NONE								A		X	[redacted]			

II. & III. INVESTMENTS AND TRUSTS: INCOME (II) and VALUE (III) (Cont.)

DESCRIPTION OF ASSETS INCLUDING TRUST ASSETS See Page 8 of Instructions.	II. Income (In excess of $100) See Page 11 of Instructions								III. Value See Page 11 of Instructions						
	Type of income	Income in thousands of dollars (check appropriate block)							Valuation Method Use Alphabetical Code	Value in thousands of dollars (check appropriate block)					
		up to 1	1+ to 2.5	2.5+ to 5	5+ to 15	15+ to 50	50+ to 100	100+		1+ to 5	5+ to 15	15+ to 50	50+ to 100	100+ to 250	250+

FINANCIAL DISCLOSURE REPORT (Cont.)

PERSON REPORTING (LAST NAME, FIRST, MIDDLE INITIAL)
Nixon, Walter L. Jr.

IV. GIFTS *None* ☒

A. Gifts of transportation, lodging, food, or entertainment. *See Page 13 of Instructions.*

SOURCE	DESCRIPTION

B. Other Gifts *See Page 14 of Instructions.*

		VALUE

V. REIMBURSEMENT *See Page 14 of Instructions.*

SOURCE	DESCRIPTION
None ☒	

VI. LIABILITIES *See Page 14 of Instructions.*

DESCRIPTION *(include identity of Payee or Creditor)* None ☐	Amount in thousands of dollars 10+ to 15	15+ to 50	100+ to 250	250+
The Mississippi Bank - Promissory Notes		X		
First Mississippi National Bank - Promissory Notes		X		
Nixon Enterprises, Inc. - Promissory Note		X		
Fairchild Construction Company - Promissory Note	X			

VII. TRANSACTIONS *See Page 15 & 16 of Instructions.*

DESCRIPTION None ☐	DATE	SALE	PURCHASE	EXCHANGE	Value in thousands of dollars 1+ to 5	5+ to 15	15+ to 50	50+ to 100	100+	250+
U. S. Treasury Notes	4-15-81		X		X					
U. S. Treasury Notes	11-30-81	X			X					
Overriding Royalty Interest W.R. Fairchild Const. Co. LTD - Lessee	2-23-81		X			X				
Oil & Gas Working Interest Geosouthern Energy Corp. - Lessee	11-06-81		X			X				
Oil & Gas Royalty Interest Robert A. Stockett, Jr. - Lessee	2-20-81		X			X				
Oil & Gas Working Interest Pattison Petroleum Corp. - Lessee	5-08-81		X			X				

VIII. POSITIONS *See Page 16 of Instructions*

POSITION	NAME OF ORGANIZATION
None ☒	

IX. AGREEMENTS *See Page 17 of Instructions*

DATES	PARTIES	TERMS
None ☒		

In accordance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not participate in any litigation during the period covered by this report in which I, my spouse, or dependent child or children had a financial interest in the outcome of such litigation.

I certify that all information given above is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

SIGNATURE Walter L. Nixon, Jr. DATE June 28, 1982

NOTE: Any individual who knowingly and willfully falsifies, or who knowingly and willfully fails to file this report may be subject to civil and criminal sanctions (28 U.S.C.A. App. 1, § 304 and 18 U.S.C. § 1001)

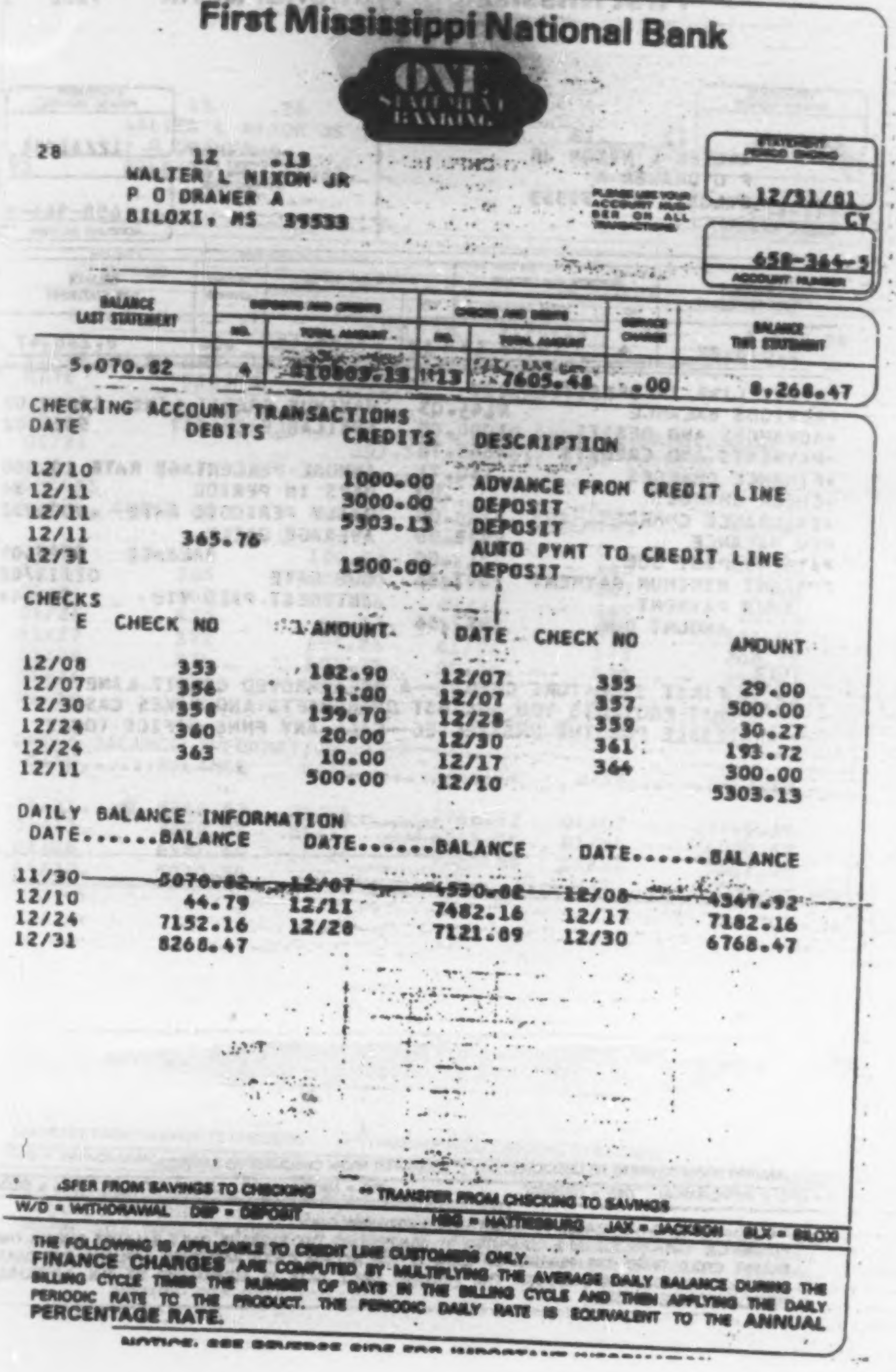
MAILING THIS FORM

Judicial Officers and Employees mail original and one copy of this form to:

Judge Edward A. Tamm
Judicial Ethics Committee
United States Courthouse
3rd & Constitution Ave., N.W.
Washington, D.C. 20001

. . . Deliver one copy to the Clerk of the Court on which you sit or serve.
Judicial Employees not associated with a specific court, such as employees of the Administrative Office and the Federal Judicial Center need not file a copy with any Clerk.

EXHIBIT 14



First Mississippi National Bank

ONE STATEMENT BANKING

28 12 .13

WALTER L NIXON JR
P O DRAWER A
BILOXI, MS 39533

PLEASE USE YOUR ACCOUNT NUMBER ON ALL TRANSACTIONS.

STATEMENT PERIOD ENDING 12/31/81

CY

658-364-5
ACCOUNT NUMBER

BALANCE LAST STATEMENT	DEPOSITS AND CREDITS		CHECKS AND DEBITS		SERVICE CHARGE	BALANCE THIS STATEMENT
	NO.	TOTAL AMOUNT	NO.	TOTAL AMOUNT		
5,070.82	4	10803.13	13	7605.48	.00	8,268.47

CHECKING ACCOUNT TRANSACTIONS

DATE	DEBITS	CREDITS	DESCRIPTION
12/10		1000.00	ADVANCE FROM CREDIT LINE
12/11		3000.00	DEPOSIT
12/11		5303.13	DEPOSIT
12/11	365.76		AUTO PYMT TO CREDIT LINE
12/31		1500.00	DEPOSIT

CHECKS

E	CHECK NO	AMOUNT	DATE	CHECK NO	AMOUNT
12/08	353	182.90	12/07	355	29.00
12/07	356	11.00	12/07	357	500.00
12/30	358	159.70	12/28	359	30.27
12/24	360	20.00	12/30	361	193.72
12/24	363	10.00	12/17	364	300.00
12/11		500.00	12/10		5303.13

DAILY BALANCE INFORMATION

DATE......BALANCE		DATE......BALANCE		DATE......BALANCE	
11/30	5070.82	12/07	4530.82	12/08	4347.92
12/10	44.79	12/11	7482.16	12/17	7182.16
12/24	7152.16	12/28	7121.89	12/30	6768.47
12/31	8268.47				

* ...SFER FROM SAVINGS TO CHECKING ** TRANSFER FROM CHECKING TO SAVINGS

W/D = WITHDRAWAL DEP = DEPOSIT HBG = HATTIESBURG JAX = JACKSON BLX = BILOXI

THE FOLLOWING IS APPLICABLE TO CREDIT LINE CUSTOMERS ONLY.

FINANCE CHARGES ARE COMPUTED BY MULTIPLYING THE AVERAGE DAILY BALANCE DURING THE BILLING CYCLE TIMES THE NUMBER OF DAYS IN THE BILLING CYCLE AND THEN APPLYING THE DAILY PERIODIC RATE TO THE PRODUCT. THE PERIODIC DAILY RATE IS EQUIVALENT TO THE ANNUAL PERCENTAGE RATE.

NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION

FIRST MISSISSIPPI NATIONAL BANK
FIRST MISSISSIPPI NATIONAL BANK, BILOXI
P O BOX 70
BILOXI, MS 39530

10/22/82 COMMERCIAL LOAN DEPARTMENT
218

PAYMENT NOTICE

1 2108900 01576 84 11,437.12

NIXON WALTER L JR 2108900

PAYMENT DUE	11,437.12
DUE DATE	11/01/82
NOTE NUMBER	01576
MATURITY	11/01/82
NOTE DATE	11/04/81
NEXT PAYMNT	11/01/82
PRINCIPAL BALANCE	10,985.00
PAYMENT CONSISTS OF	
PRINCIPAL	10,985.00
INTEREST	452.12
LATE CHARGE	0.00
INTEREST RATE	16.500000

DEAR CUSTOMER,
OUR RECORDS INDICATE A PAYMENT IS DUE FOR THE NOTE(S) DESCRIBED HEREIN. PLEASE INCLUDE THIS NOTICE WITH YOUR PAYMENT.

WALTER L NIXON JR
P O DRAWER A
BILOXI MS 39533

pd 11/2/82
Ck# 2429
WLN Spec acct

CURRENT DUE 11,437.12 TOTAL DUE 11,437.12

PAST DUE	0.00
TOTAL DUE	11,437.12

2103900	1576		218	
CUSTOMER NUMBER	NOTE NUMBER	DATE OF NOTE	OFFICER	COLL CODE

ORIGINAL AMOUNT OF NOTE	DATE DUE	INTEREST RATE	PER DAY INTEREST	INTEREST DUE	PRINCIPAL DUE	TOTAL AMOUNT DUE
$10,985.00		14.50		74.19	0	$74.19

REASON FOR NOTICE:

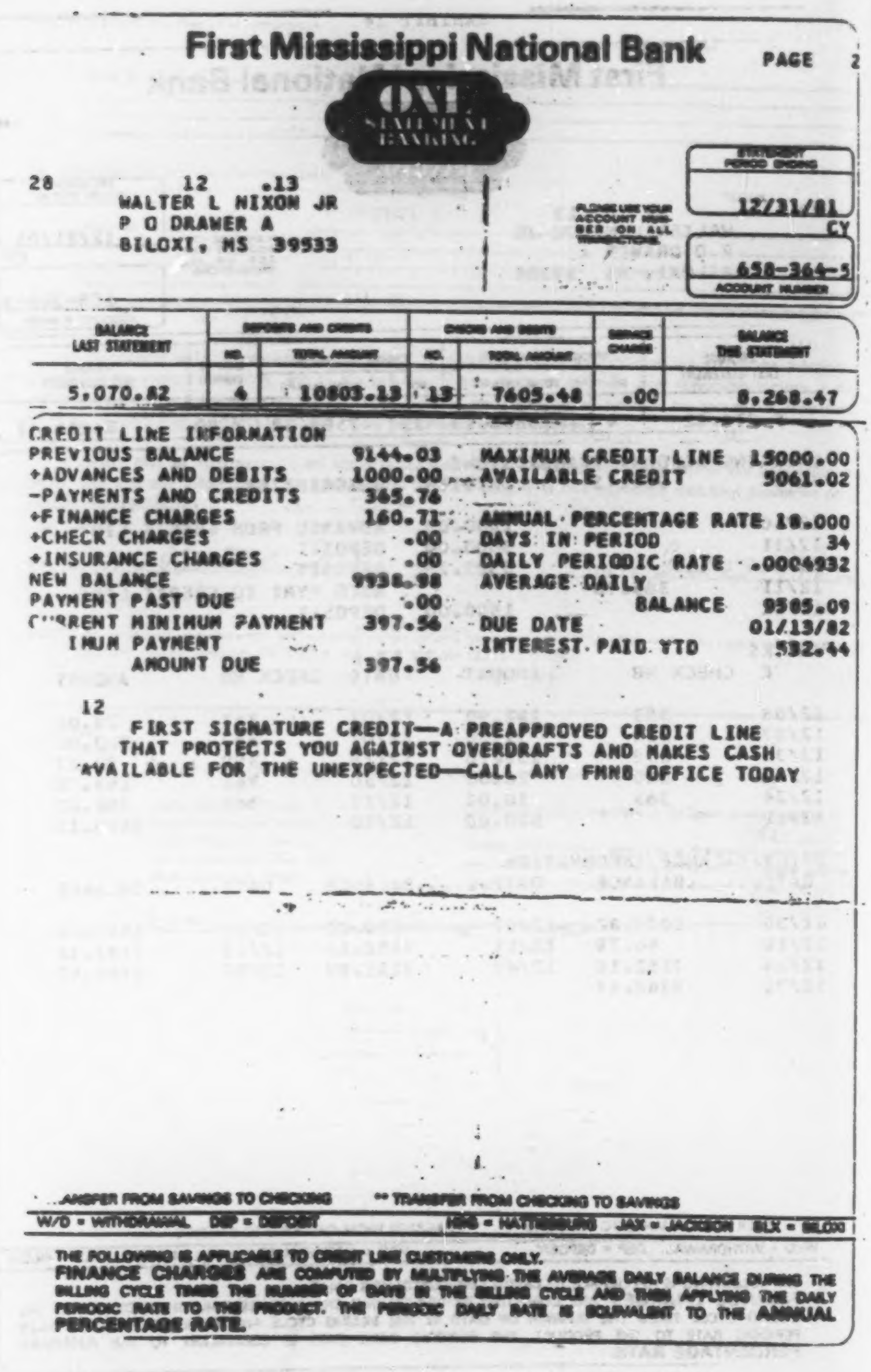
15

Walter L. Nixon Jr.
P. O. Drawer A
Biloxi, Ms. 39533

Pd 12/17/82
VR
Ck# 2455
Peoples Bank
Spec Acct

Interest due to pay off note.
Principal paid 11-18-82

PLEASE PRESENT THIS NOTICE AT NOTE PAYMENT WINDOW.



First Mississippi National Bank PAGE 2

ONE STATEMENT BANKING

28 12 .13
WALTER L NIXON JR
P O DRAWER A
BILOXI, MS 39533

PLEASE USE YOUR ACCOUNT NUMBER ON ALL TRANSACTIONS.

STATEMENT PERIOD ENDING 12/31/81
CY
658-364-5
ACCOUNT NUMBER

BALANCE LAST STATEMENT	DEPOSITS AND CREDITS		CHECKS AND DEBITS		SERVICE CHARGE	BALANCE THIS STATEMENT
	NO.	TOTAL AMOUNT	NO.	TOTAL AMOUNT		
5,070.82	4	10803.13	13	7605.48	.00	8,268.47

CREDIT LINE INFORMATION

PREVIOUS BALANCE	9144.03	MAXIMUM CREDIT LINE	15000.00
+ADVANCES AND DEBITS	1000.00	AVAILABLE CREDIT	5061.02
-PAYMENTS AND CREDITS	365.76		
+FINANCE CHARGES	160.71	ANNUAL PERCENTAGE RATE	18.000
+CHECK CHARGES	.00	DAYS IN PERIOD	34
+INSURANCE CHARGES	.00	DAILY PERIODIC RATE	.0004932
NEW BALANCE	9938.98	AVERAGE DAILY BALANCE	9505.09
PAYMENT PAST DUE	.00		
CURRENT MINIMUM PAYMENT	397.56	DUE DATE	01/13/82
IMUM PAYMENT AMOUNT DUE	397.56	INTEREST PAID YTD	532.44

12

FIRST SIGNATURE CREDIT—A PREAPPROVED CREDIT LINE THAT PROTECTS YOU AGAINST OVERDRAFTS AND MAKES CASH AVAILABLE FOR THE UNEXPECTED—CALL ANY FMNB OFFICE TODAY

ANSFER FROM SAVINGS TO CHECKING ** TRANSFER FROM CHECKING TO SAVINGS

W/D = WITHDRAWAL DEP = DEPOSIT HBG = HATTIESBURG JAX = JACKSON BLX = BILOXI

THE FOLLOWING IS APPLICABLE TO CREDIT LINE CUSTOMERS ONLY.

FINANCE CHARGES ARE COMPUTED BY MULTIPLYING THE AVERAGE DAILY BALANCE DURING THE BILLING CYCLE TIMES THE NUMBER OF DAYS IN THE BILLING CYCLE AND THEN APPLYING THE DAILY PERIODIC RATE TO THE PRODUCT. THE PERIODIC DAILY RATE IS EQUIVALENT TO THE **ANNUAL PERCENTAGE RATE.**

First Mississippi National Bank

ONE STATEMENT BANKING

28 15 .26
WALTER L NIXON JR
P O DRAWER A
BILOXI, MS 39533

PLEASE USE YOUR ACCOUNT NUMBER ON ALL TRANSACTIONS

STATEMENT PERIOD ENDING
01/29/82
CY

658-364-5
ACCOUNT NUMBER

BALANCE LAST STATEMENT	DEPOSITS AND CREDITS		CHECKS AND DEBITS		SERVICE CHARGE	BALANCE THIS STATEMENT
	NO.	TOTAL AMOUNT	NO.	TOTAL AMOUNT		
8,268.47		.00	16	3198.13	.00	5,070.34

CHECKING ACCOUNT TRANSACTIONS

DATE	DEBITS	CREDITS	DESCRIPTION
01/13	397.56		AUTO PYMT TO CREDIT LINE
01/21		397.56	CREDIT LINE PAYMENT

CHECKS

DATE	CHECK NO	AMOUNT	DATE	CHECK NO	AMOUNT
01/04	362	100.00	01/04	365	200.00
01/04	366	200.00	01/07	367	22.88
01/21	368	397.56	01/25	369	63.18
01/21	370	86.97	01/29	371	141.97
01/27	372	694.84	01/26	373	208.72
01/28	374	107.75	01/29	375	154.32
01/26	376	210.00	01/27	377	121.38
01/29	378	91.00			

DAILY BALANCE INFORMATION

DATE	BALANCE	DATE	BALANCE	DATE	BALANCE
12/31	8268.47	01/04	7768.47	01/07	7745.59
01/13	7348.03	01/21	6863.50	01/25	6800.32
01/26	6381.60	01/27	5565.38	01/28	5457.63
01/29	5070.34				

TRANSFER FROM SAVINGS TO CHECKING ** TRANSFER FROM CHECKING TO SAVINGS

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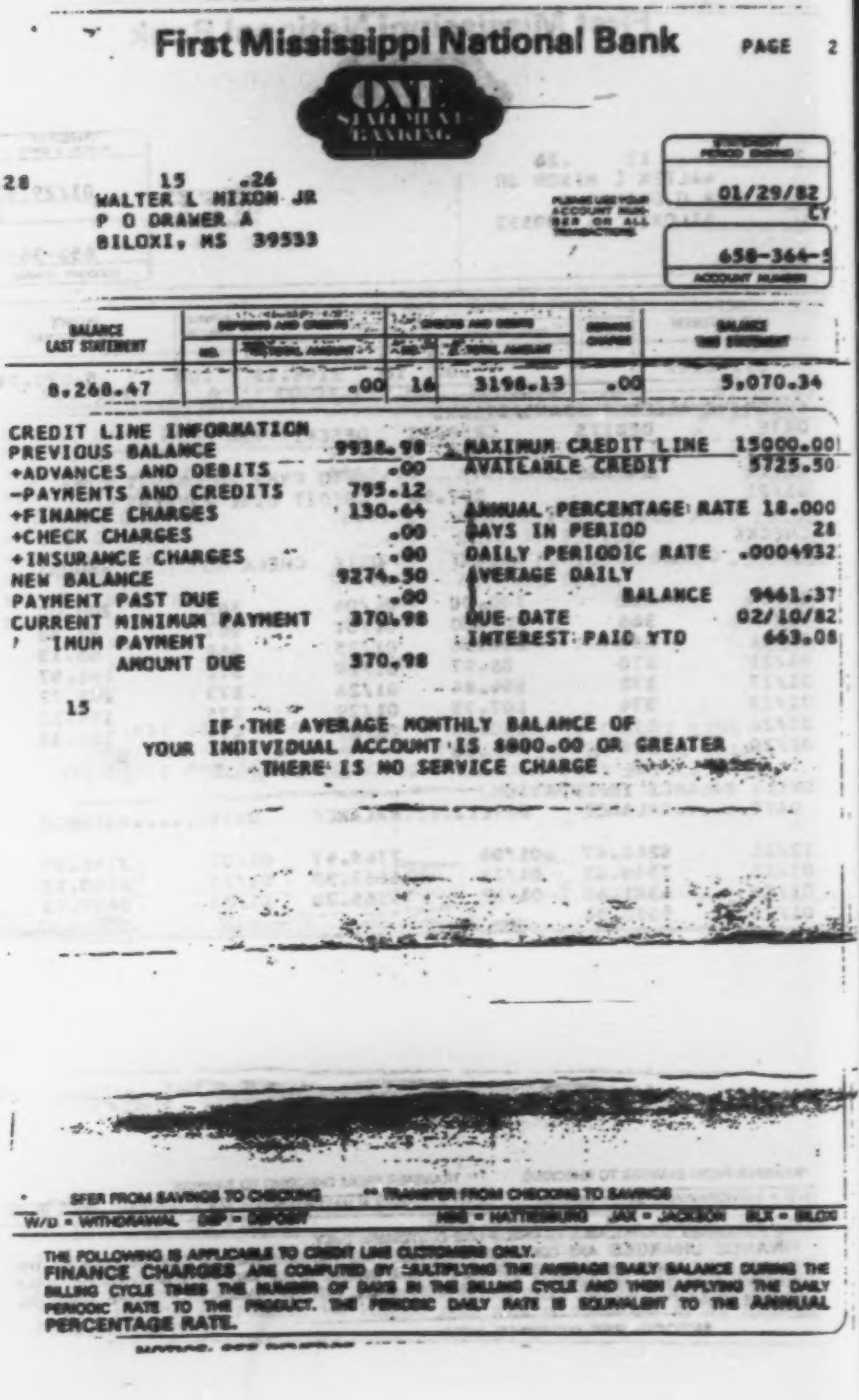
NOTICE: SEE REVERSE SIDE



First Mississippi National Bank PAGE 2

ONE STATEMENT BANKING

28 15 .26

WALTER L NIXON JR
P O DRAWER A
BILOXI, MS 39533

PLEASE USE YOUR ACCOUNT NUMBER ON ALL TRANSACTIONS

STATEMENT PERIOD ENDING 01/29/82 CY

658-364-
ACCOUNT NUMBER

BALANCE LAST STATEMENT	DEPOSITS AND CREDITS NO.	DEPOSITS AND CREDITS TOTAL AMOUNT	CHECKS AND DEBITS NO.	CHECKS AND DEBITS TOTAL AMOUNT	SERVICE CHARGE	BALANCE THIS STATEMENT
8,268.47		.00	16	3198.13	.00	5,070.34

CREDIT LINE INFORMATION			
PREVIOUS BALANCE	9938.98	MAXIMUM CREDIT LINE	15000.00
+ADVANCES AND DEBITS	.00	AVAILABLE CREDIT	5725.50
-PAYMENTS AND CREDITS	795.12		
+FINANCE CHARGES	130.64	ANNUAL PERCENTAGE RATE	18.000
+CHECK CHARGES	.00	DAYS IN PERIOD	28
+INSURANCE CHARGES	.00	DAILY PERIODIC RATE	.0004932
NEW BALANCE	9274.50	AVERAGE DAILY BALANCE	9461.37
PAYMENT PAST DUE	.00		
CURRENT MINIMUM PAYMENT	370.98	DUE DATE	02/10/82
IMUM PAYMENT AMOUNT DUE	370.98	INTEREST PAID YTD	663.08

15

IF THE AVERAGE MONTHLY BALANCE OF
YOUR INDIVIDUAL ACCOUNT IS $800.00 OR GREATER
THERE IS NO SERVICE CHARGE.

SFER FROM SAVINGS TO CHECKING ** TRANSFER FROM CHECKING TO SAVINGS

W/D = WITHDRAWAL DEP = DEPOSIT HBG = HATTIESBURG JAX = JACKSON BLX = BILOXI

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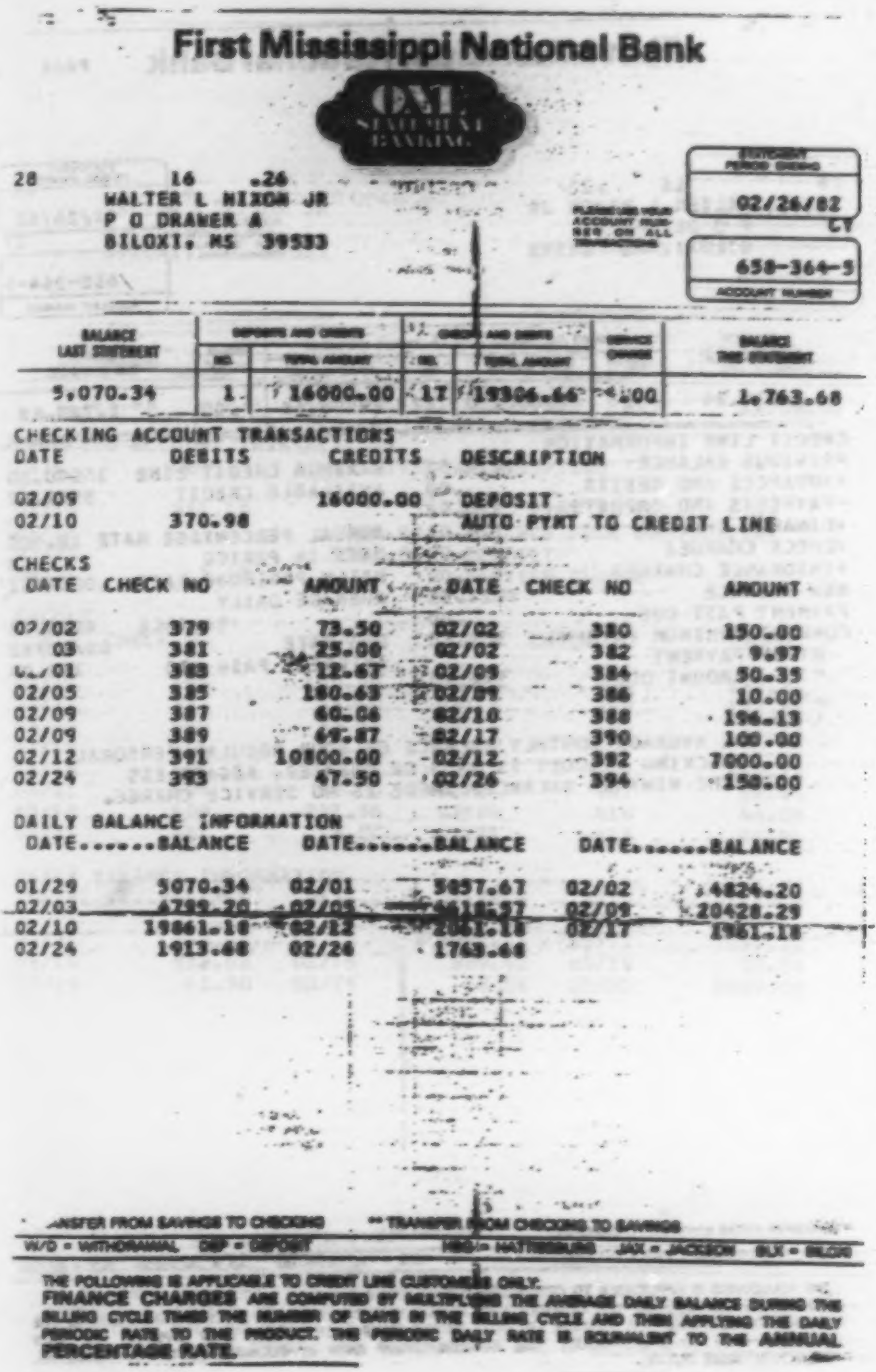

First Mississippi National Bank

28 16 .26
WALTER L NIXON JR
P O DRAWER A
BILOXI, MS 39533

STATEMENT PERIOD ENDING
02/26/82
CY

PLEASE USE YOUR ACCOUNT NUMBER ON ALL TRANSACTIONS

658-364-5
ACCOUNT NUMBER

BALANCE LAST STATEMENT	DEPOSITS AND CREDITS		CHECKS AND DEBITS		SERVICE CHARGE	BALANCE THIS STATEMENT
	NO.	TOTAL AMOUNT	NO.	TOTAL AMOUNT		
5,070.34	1	16000.00	17	19306.66	.00	1,763.68

CHECKING ACCOUNT TRANSACTIONS

DATE	DEBITS	CREDITS	DESCRIPTION
02/09		16000.00	DEPOSIT
02/10	370.98		AUTO PYMT TO CREDIT LINE

CHECKS

DATE	CHECK NO	AMOUNT	DATE	CHECK NO	AMOUNT
02/02	379	73.50	02/02	380	150.00
03	381	25.00	02/02	382	9.97
02/01	383	12.67	02/09	384	50.35
02/05	385	180.63	02/09	386	10.00
02/09	387	60.06	02/10	388	196.13
02/09	389	69.87	02/17	390	100.00
02/12	391	10800.00	02/12	392	7000.00
02/24	393	47.50	02/26	394	150.00

DAILY BALANCE INFORMATION

DATE	BALANCE	DATE	BALANCE	DATE	BALANCE
01/29	5070.34	02/01	5057.67	02/02	4824.20
02/03	4799.20	02/05	4618.57	02/09	20428.29
02/10	19861.18	02/12	2061.18	02/17	1961.18
02/24	1913.68	02/26	1763.68		

* ANSFER FROM SAVINGS TO CHECKING ** TRANSFER FROM CHECKING TO SAVINGS

W/D = WITHDRAWAL DEP = DEPOSIT HBG = HATTIESBURG JAX = JACKSON BLX = BILOXI

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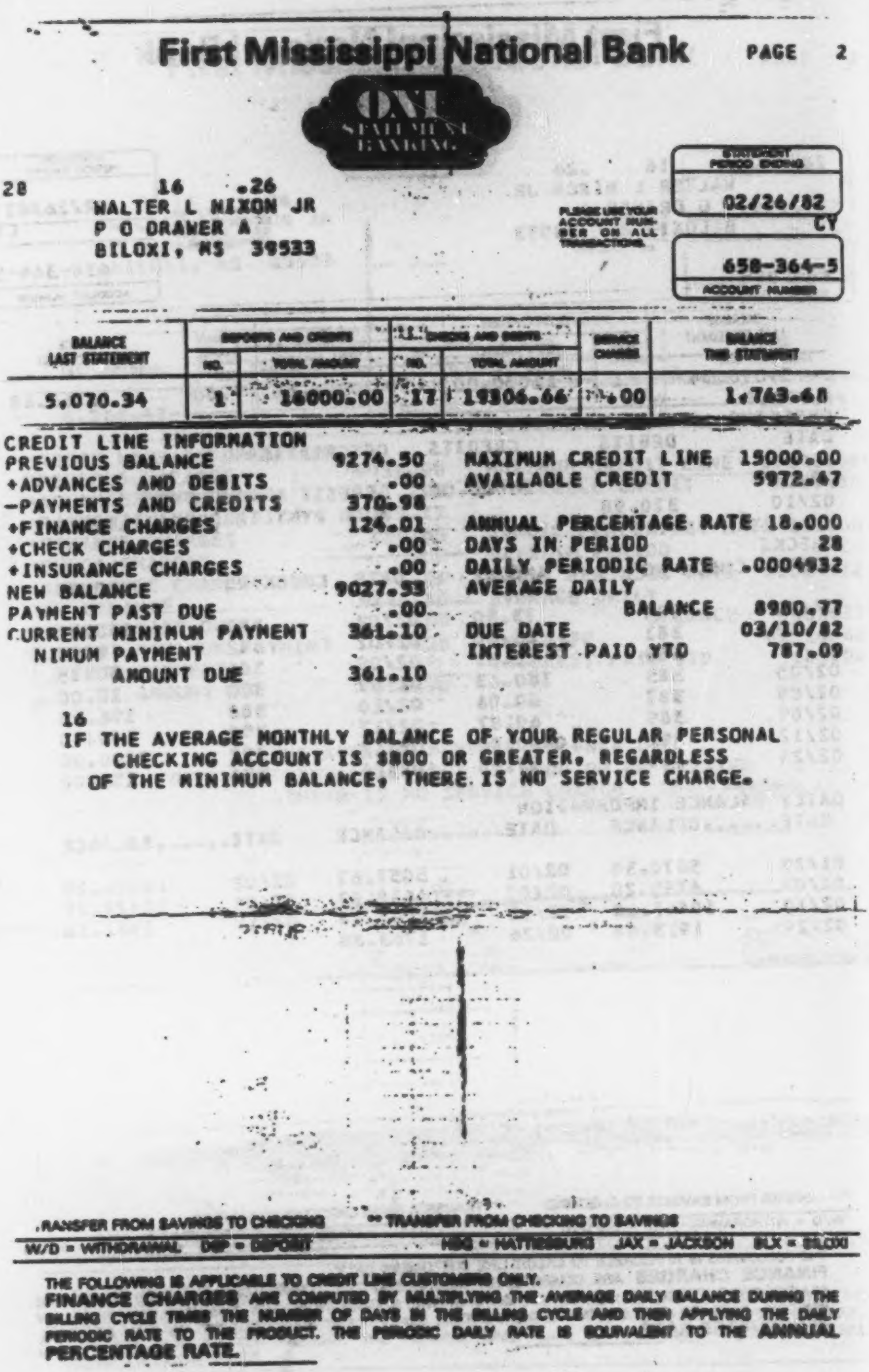

First Mississippi National Bank PAGE 2

28 16 .26

WALTER L NIXON JR
P O DRAWER A
BILOXI, MS 39533

PLEASE USE YOUR ACCOUNT NUMBER ON ALL TRANSACTIONS.

STATEMENT PERIOD ENDING 02/26/82 CY

658-364-5
ACCOUNT NUMBER

BALANCE LAST STATEMENT	DEPOSITS AND CREDITS		CHECKS AND DEBITS		SERVICE CHARGE	BALANCE THIS STATEMENT
	NO.	TOTAL AMOUNT	NO.	TOTAL AMOUNT		
5,070.34	1	16000.00	17	19306.66	.00	1,763.68

CREDIT LINE INFORMATION

PREVIOUS BALANCE	9274.50	MAXIMUM CREDIT LINE	15000.00
+ADVANCES AND DEBITS	.00	AVAILABLE CREDIT	5972.47
-PAYMENTS AND CREDITS	370.98		
+FINANCE CHARGES	124.01	ANNUAL PERCENTAGE RATE	18.000
+CHECK CHARGES	.00	DAYS IN PERIOD	28
+INSURANCE CHARGES	.00	DAILY PERIODIC RATE	.0004932
NEW BALANCE	9027.53	AVERAGE DAILY BALANCE	8980.77
PAYMENT PAST DUE	.00		
CURRENT MINIMUM PAYMENT	361.10	DUE DATE	03/10/82
NIMUM PAYMENT AMOUNT DUE	361.10	INTEREST PAID YTD	787.09

16
IF THE AVERAGE MONTHLY BALANCE OF YOUR REGULAR PERSONAL
CHECKING ACCOUNT IS $800 OR GREATER, REGARDLESS
OF THE MINIMUM BALANCE, THERE IS NO SERVICE CHARGE.

.RANSFER FROM SAVINGS TO CHECKING ** TRANSFER FROM CHECKING TO SAVINGS

W/D = WITHDRAWAL DEP = DEPOSIT HBG = HATTIESBURG JAX = JACKSON BLX = BILOXI

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First Mississippi National Bank

ONE STATEMENT BANKING

28 16 .34

WALTER L NIXON JR
P O DRAWER A
SILOXI, MS 39533

PLEASE USE YOUR ACCOUNT NUMBER ON ALL TRANSACTIONS.

STATEMENT PERIOD ENDING	03/31/82 CY
ACCOUNT NUMBER	658-364-5

BALANCE LAST STATEMENT	DEPOSITS AND CREDITS		CHECKS AND DEBITS		SERVICE CHARGE	BALANCE THIS STATEMENT
	NO.	TOTAL AMOUNT	NO.	TOTAL AMOUNT		
1,763.68	2	3661.96	17	1914.13	2.45	3,509.06

CHECKING ACCOUNT TRANSACTIONS

DATE	DEBITS	CREDITS	DESCRIPTION
03/10	361.10		AUTO PYMT TO CREDIT LINE
03/18		100.00	ADVANCE FROM CREDIT LINE
03/31		3561.96	DEPOSIT
03/31	2.45		SERVICE CHARGE

CHECKS

DATE	CHECK NO	AMOUNT	DATE	CHECK NO	AMOUNT
03/11	395	150.00	03/11	396	152.36
03/11	397	63.00	03/15	398	122.86
03/15	399	30.52	03/14	400	53.25
03/19	401	10.00	03/15	402	20.00
03/18	403	185.00	03/15	404	369.73
03/11	405	20.00	03/14	407	31.44
03/18	408	231.86	03/24	410	44.00
03/31	411	15.00	03/31	413	54.01

DAILY BALANCE INFORMATION

DATE	BALANCE	DATE	BALANCE	DATE	BALANCE
02/26	1763.68	03/10	1402.58	03/11	1017.22
03/14	932.53	03/15	389.42	03/18	72.56
03/19	62.56	03/24	18.56	03/31	3509.06

* TRANSFER FROM SAVINGS TO CHECKING   ** TRANSFER FROM CHECKING TO SAVINGS

W/D = WITHDRAWAL   DEP = DEPOSIT   HBG = HATTIESBURG   JAX = JACKSON   BLX = BILOXI

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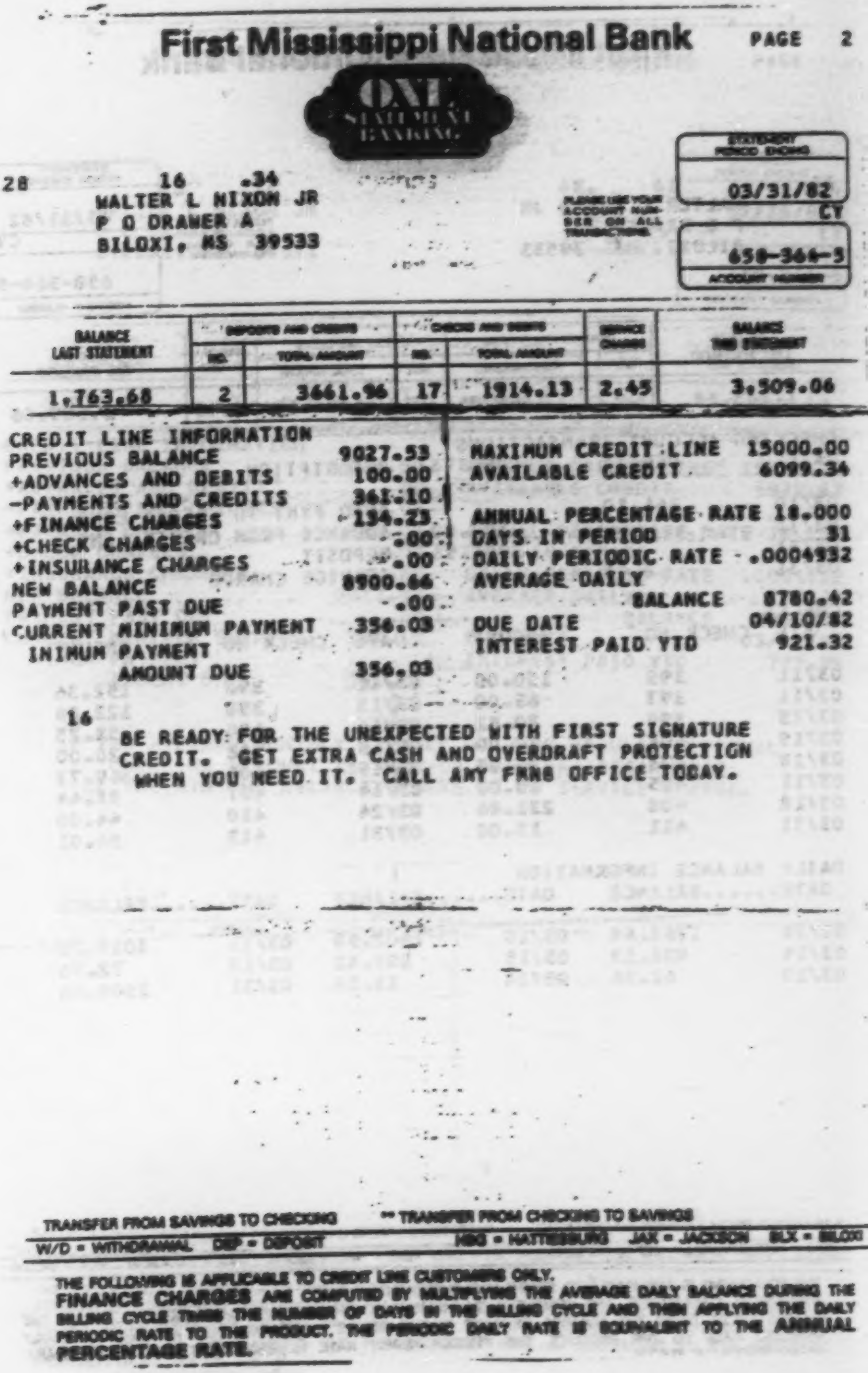

First Mississippi National Bank PAGE 2

ONE STATEMENT BANKING

STATEMENT PERIOD ENDING 03/31/82

CY

658-364-5

ACCOUNT NUMBER

PLEASE USE YOUR ACCOUNT NUMBER ON ALL TRANSACTIONS

28 16 .34

WALTER L NIXON JR
P O DRAWER A
BILOXI, MS 39533

BALANCE LAST STATEMENT	DEPOSITS AND CREDITS		CHECKS AND DEBITS		SERVICE CHARGE	BALANCE THIS STATEMENT
	NO.	TOTAL AMOUNT	NO.	TOTAL AMOUNT		
1,763.68	2	3661.96	17	1914.13	2.45	3,509.06

CREDIT LINE INFORMATION

PREVIOUS BALANCE	9027.53
+ADVANCES AND DEBITS	100.00
-PAYMENTS AND CREDITS	361.10
+FINANCE CHARGES	134.23
+CHECK CHARGES	.00
+INSURANCE CHARGES	.00
NEW BALANCE	8900.66
PAYMENT PAST DUE	.00
CURRENT MINIMUM PAYMENT	356.03
INIMUM PAYMENT AMOUNT DUE	356.03

MAXIMUM CREDIT LINE	15000.00
AVAILABLE CREDIT	6099.34
ANNUAL PERCENTAGE RATE	18.000
DAYS IN PERIOD	31
DAILY PERIODIC RATE	.0004932
AVERAGE DAILY BALANCE	8780.42
DUE DATE	04/10/82
INTEREST PAID YTD	921.32

16

BE READY FOR THE UNEXPECTED WITH FIRST SIGNATURE CREDIT. GET EXTRA CASH AND OVERDRAFT PROTECTION WHEN YOU NEED IT. CALL ANY FMNB OFFICE TODAY.

TRANSFER FROM SAVINGS TO CHECKING ** TRANSFER FROM CHECKING TO SAVINGS

W/D = WITHDRAWAL DEP = DEPOSIT HBG = HATTIESBURG JAX = JACKSON BLX = BILOX

THE FOLLOWING IS APPLICABLE TO CREDIT LINE CUSTOMERS ONLY.
FINANCE CHARGES ARE COMPUTED BY MULTIPLYING THE AVERAGE DAILY BALANCE DURING THE BILLING CYCLE TIMES THE NUMBER OF DAYS IN THE BILLING CYCLE AND THEN APPLYING THE DAILY PERIODIC RATE TO THE PRODUCT. THE PERIODIC DAILY RATE IS EQUIVALENT TO THE **ANNUAL PERCENTAGE RATE.**

EXHIBIT 15

W.R.FAIRCHILD CONSTRUCTION COMPANY, LTD.

P. O. BOX 15808 • TEL. 544-1151 • HATTIESBURG, MISSISSIPPI 39402-5909

WILEY FAIRCHILD
PARTNER AND
GENERAL MANAGER

January 24, 1989

Peter Keith
Office of Special Consultant
House Judiciary Consultant
House Annex 2 -- RM 366
Washington, DC 20515

Dear Mr. Keith:

Enclosed is a listing of all monies paid to Walter L.Nixon, Jr. on his oil investments up to date as follows:

Wilkie Gas Unit # 28	
W. R. Fairchild Construction Company, Ltd.	$42,912.69
Rogers 28-11	
W. R. Fairchild Construction Company, Ltd.	26,764.20
L.D. Ross Well	
W. R. Fairchild Consttuction Company, Ltd.	39.24
Fairchild-Windham Exploration Company	3,079.67
Marie Fairchild Life Ins. Trust	133.62
Rodney Fairchild Liife Ins. Trust	100.25
Total Paid to Date	$73,029.67

Sincerely,

W. R. FAIRCHILD CONSTRUCTION COMPANY, LTD.

Wiley Fairchild

WF/ljs

Enclosures

cc: Larry Gunn

Payments to Walter L Nixon Jr - Wilkie Gas Unit # 28

Pg. 1

Date	Payment No.	Amount
9-1-82	1	$10,095.
9-22-82	2	894.8
10-22-82	3	690.33
11-22-82	4	873.18
12-23-82	5	815.22
1-7-83	6	11.80
1-24-83	7	758.62
2-22-83	8	869.93
3-23-83	9	1,021.00
4-22-83	10	649.09
5-23-83	11	680.76
6-23-83	12	643.92
7-22-83	13	612.23
8-22-83	14	709.73
9-23-83	15	817.87
10-24-83	16	545.05
11-22-83	17	572.49
12-27-83	18	758.23
1-23-84	19	781.52
2-27-84	20	783.82
3-23-84	21	532.26
4-23-84	22	457.50
5-21-84	23	519.21
6-27-84	24	729.21
Total To date		$25,871.93

Page 2

Payments to Walter L Nixon Jr - Wilkie Gas Unit #28

Date	Payment No	VO#	CK#	Amount
6-27-84	B/F'd			$ 25,871.93
7-23-84	25	7-424	12520	823.01 ✓
8-23-84	26	8-471	13052	771.59 ✓
9-24-84	27	9-541	13647	665.19 ✓
10-23-84	28	10-495	14152	510.67 ✓
11-26-84	29	11-516	14811	822.05 ✓
12-24-84	30	12-504	15375	920.72 ✓
1-21-85	31	1-471	15853	944.25 ✓
2-22-85	32	3-024	16461	912.82 ✓
3-22-85	33	3-507	436	849.11 ✓
4-22-85	34	4-284	1011	847.36 ✓
5-24-85	35	5-478	1591	741.37 ✓
	Total To Date			$ 34,677.07
6-27-85	36			164.94
7-22-85	37			581.10
8-22-85	38			453.47
	Total to Date			35,876$^{\underline{58}}$

W R Fairchild Const Co Ltd
Payments to Walter L. Nixon, Jr - Wilkie Gas Unit #28

Date	Payment No.	Amount
2-22-85	B/F'd	35,876.58
9-23-85	39	236.19
9-27-85	40	39.40
10-23-85	41	288.44
11-22-85	42	213.75
12-23-85	43	218.76
1-22-86	44	276.56
2-24-86	45	294.85
3-24-86	46	216.62
4-23-86	47	189.80
5-23-86	48	145.51
6-25-86	49	164.05
7-24-86	50	143.29
8-25-86	51	132.86
9-22-86	52	137.79
10-23-86	53	142.67
11-24-86	54	143.08
12-22-86	55	139.50
1-23-87	56	137.59
2-23-87	57	157.53
3-24-87	58	159.31
4-23-87	59	177.96
5-22-87	60	180.02
total this Page		39,912.31

Page 4

W K Fairchild Const Co. Ltd

Payments to Walter L. Rison, Jr. Willie Gas Unit #78

Date	Payment #	Amount
5-22-87	Balance Forward	39,812.31
6-22-87	61	167.67
7-22-87	62	171.77
8-24-87	63	188.15
9-23-87	64	186.14
10-22-87	65	159.38
11-23-87	66	180.58
12-28-87	67	200.84
1-22-88	68	176.42
2-23-88	69	186.13
3-23-88	70	184.38
4-25-88	71	171.72
5-23-88	72	170.35
6-23-88	73	178.43
7-22-88	74	173.98
8-22-88	75	156.12
9-22-88	76	138.44
11-23-88	77	43.04
12-22-88	78	106.30
1-23-89	79	160.54
Total to Date		42,912.69

Page 1

[illegible]

Date	Payment No.	Amount
2-19-82	1	$ 5,941.0
3-3-82	2	1,071.2
3-26-82	3	1,103.88
4-28-82	4	971.84
5-24-82	5	1,060.70
6-25-82	6	974.69
7-23-82	7	1028.70
8-23-82	8	1,061.61
9-29-82	9	1,321.75
10-25-82	10	846.01
11-29-82	11	867.50
12-29-82	12	815.44
1-27-83	13	343.37
2-25-83	14	446.29
3-25-83	15	715.78
4-22-83	16	678.29
5-23-83	17	557.44
6-23-83	18	805.89
7-22-83	19	325.69
8-26-83	20	169.17
9-22-83	21	107.33
12-27-83	22	55.47
1-27-84	23	110.09
4-27-84	24	107.38
5-24-84	25	207.00
6-26-84	26	199.13
	Total To date	$ 21,892.74

Page 2

Payments to Walter L Nixen Jr - Rogers 28-11

Date	Payment No.	VO#	CK#	Amount
6-26-84	B/Fd			$ 21,892.74
7-30-84	27	7-424	12520	152.17
8-29-84	28	8-471	13052	155.54
9-28-84	29	9-541	13647	184.26
10-27-84	30	10-495	14152	194.53
11-28-84	31	11-516	14811	142.71
12-31-84	32	12-504	15325	136.03
1-25-85	33	1-471	15853	138.12
3-1-85	34	3-024	16461	140.34
3-22-85	35	3-507	436	141.89
4-19-85	36	4-284	1011	116.38
5-20-85	37	5-478	1591	155.18
	Total to Date			$ 23,549.89
6-21-85	38			134.25
7-24-85	39			131.04
8-22-85	40			127.58
	Total to Date			23.9427

Page 3

W R Fairchild Const Co Ltd
Payments to Walter L. Nixon, Jr - Rogers 28-11

Date	Payment No	Amount
8-22-85	B/F'd	23,942.76
9-23-85	41	137.09
10-22-85	42	8.85
11-20-85	43	202.90
12-23-85	44	6.76
12-26-85	45	55.54
1-30-86	46	66.43
2-28-86	47	92.00
3-27-86	48	77.95
4-28-86	49	80.34
5-27-86	50	88.78
6-26-86	51	74.46
7-28-86	52	75.37
8-27-86	53	66.60
9-29-86	54	53.49
10-28-86	55	43.06
11-28-86	56	35.43
12-31-86	57	15.89
1-28-87	58	13.74
3-9-87	59	23.13
3-27-87	60	37.87
4-28-87	61	288.13
6-3-87	62	172.32
total this Page		25,658.89

W R Fairchild Const Co Ltd　　　　Page 4

Payments to Walter L. Rixon Jr.　　　　Rogers 28-11

Date	Payment #	Amount
6-3-87	Balance Forward	25,658.89
7-9-87	63	91.02
7-28-87	64	19.22
8-31-87	65	13.44
9-29-87	66	25.65
10-26-87	67	42.79
11-30-87	68	17.78
12-31-87	69	66.90
2-1-88	70	42.13
3-1-88	71	68.48
3-25-88	72	1.38
4-29-88	73	9.37
5-27-88	74	2.47
6-30-88	75	4.10
7-28-88	76	144.12
8-29-88	77	100.39
9-30-88	78	160.06
10-27-88	79	103.65
11-28-88	80	123.99
12-28-88	81	68.37
total to Date		26,764.20

W.R. Fairchild Const Co Ltd
Payments to Walter L. Nixon, Jr - L. D. Ross Well

Date	Payment No	Amount
12-31-87	1	21.11
8-29-88	2	18.13
	Total to Date 1-23-89	39.24

Royalty Payments on L. D. Ross

Date	Payment No.	Amou
2/8/82	I	464.
[illegible]/82	2	1.1
6/7/82	3	143.5
9/15/82	4	11.9
1/5/83	5	5.
3/14/83	6	372.6
5/9/83	7	3.6
7/13/83	8	4.2
12/13/83	9	156.3
2/10/84	10	89.8
4/15/84	11	5.4
7/5/84	12	428.5
	Total To Date	$1,659.13
10/2/84	13	7^{92}
11/[illegible]/84	14	246.51
12/[illegible]/84	15	2.29
2/12/85	16	177^{43}
4/15/85	17	3^{25}
5/23/85	18	122.36
		$2,246.89

Date	Payment No	Amount
8/26/85	19	5^{65}
9/11/85	20	186^{46}
11/14/85	21	3.90
1/22/86	22	194.83
3/28/86	23	6.36
6/25/86	24	195.08
9/24/86	25	5.23
10/14/86	26	101.51
12/29/86	27	.88
2/13/87	28	129.03
6/10/87	29	3.85
		# 3.679^{67}

Total Paid To Walter L. Nixon
By Fairchild Windham Exp. Co.
ON L. D. Ross Well

Marie I. Fairchild
Life Insurance Trust
Royalty Payments to
Walter L. Nixon or L. D. Rowswell

Date	Payment No	Amount
7/31/87	I	81.34
1/7/88	2	28.11
8/23/88	3	24.17
Total Paid By MIFLI		$ 133.62

Rodney Fairchild
Life Insurance Trust
Royalty Payment to Waller
L. Nixon - ON L.D. Ross Well

Date	Payment No.	Amount
7/31/87	I	61^{00}
1/7/88	2	21^{12}
8/23/88	3	18^{13}
	Total Paid By RFLIT	$100.25

EXHIBIT 16

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515-6216
One Hundred First Congress

February 21, 1989

Mr. Steven Lubet
Professor of Law
Northwestern University School of Law
357 East Chicago Avenue
Chicago, Illinois 60611

Dear Professor Lubet:

Thank you again for your interest in the impeachment inquiry concerning U.S. District Judge Walter L. Nixon, Jr.

In analyzing whether Judge Nixon's involvement in The Boam Co., et al. v. Dependable Insurance, Co., et al. and Jack H. Seymour, Jr. v. L& A Contracting Co., et al., was consistent with the requirements of the disqualification statute, 28 U.S.C. Section 455, and the Code of Judicial Conduct, you may assume the following facts taken from Judge Nixon's testimony and records in the two cases.

1. The Boam Co., et al. v. Dependable Insurance Co., et al. was initially filed in state court but removed to federal court in November 1977 and assigned to Judge Nixon. The case involved the construction and renovation of pump stations for the sewage system in Gulfport, Mississippi. A number of parties were involved in the litigation, including the City of Gulfport, the prime contractor on the project, a bonding company and various subcontractors and suppliers. On August 25, 1978 W.R. Fairchild Construction Co. Ltd., a subcontractor on the project, moved to intervene in the case to recover $18,600 in fees and materials allegedly owed. Intervention was granted by order dated September 7, 1978 signed by Magistrate John Roper, who was handling non-dispositive pre-trial motions in the case. Magistrate Roper heard other preliminary issues in September and November 1978.

2. On February 13, 1979 Judge Nixon rendered his first orders in The Boam Co., granting certain default judgments to parties other than Fairchild. During February of 1979 Judge Nixon

also met with Carroll Ingram, a friend of Nixon's, former state legislator and an attorney who practiced before Nixon. Nixon advised Ingram that he wanted to supplement his judicial income, and discussed with Ingram the possibility of an oil and gas investment with Wiley R. Fairchild, a client of Ingram's and managing officer and a partner of W.R. Fairchild Construction Co, Ltd. At the time of his meeting with Ingram, Judge Nixon had never met Wiley Fairchild, but knew that he was in the construction business and had often driven past the offices of Fairchild Construction in Hattiesburg. An investment with Fairchild was Judge Nixon's idea, not Carrol Ingram's.

3. After meeting with Ingram, Judge Nixon checked on Wiley Fairchild's reputation and determined that he was a successful businessman with expertise in oil and gas matters. Nixon contacted Ingram again in the spring of 1979 to confirm his interest in any "good" investments Fairchild might have. Nixon told Ingram he could afford to spend approximately $10,000.

4. On May 3, 1979, Judge Nixon heard motions in Boam Co. involving parties other than Fairchild Construction. On May 23, 1979 Dependable Insurance Co., a party defendant in Boam Co., moved for summary judgment against Fairchild Construction. Dependable filed similar motions against the other intervening parties. Copies of the summary judgment motions and supporting materials were delivered directly to Nixon's chambers. Fairchild Construction did not respond in writing to the summary judgment motion.

5. After his conversation with Ingram in the spring of 1979, Judge Nixon contacted Ingram "a couple of times" to check on the possible investment with Fairchild. In the summer of 1979, Ingram told Nixon that he had spoken with Wiley Fairchild, and that Fairchild would be "delighted" to put Nixon in mineral interests. Ingram indicated he would again contact the judge after he had the opportunity to talk with Fairchild in more detail.

6. On June 5, 1979 Judge Nixon referred the Boam Co. case to Magistrate Roper, but continued to handle pending matters. Judge Nixon entered orders applicable to parties other than Fairchild on June 8, 13 and 19, 1979. A formal order of reference was entered in the case on July 9, 1979, signed by Judge Nixon and consented to by four of the parties but not Fairchild Construction. The order of reference authorized trial and a final decision by a magistrate, but noted the presiding district judge would enter judgment "if appropriate, upon review of the proceedings."

7. On August 9, 1979 Judge Nixon entered a written order denying Dependable's summary judgment motion against Fairchild Construction as "not well taken." Judge Nixon entered similar orders denying Dependable's summary judgment motions against the other intervening subcontractors. There is no record that any of the summary judgment motions were ever argued orally before the court.

8. In late 1979 Judge Nixon again spoke with Ingram concerning the investment with Fairchild. Ingram told Nixon that he had spoken with Fairchild and identified three specific wells Fairchild was offering. Ingram also indicated that the cost would be $9500. Judge Nixon did not negotiate with either Ingram or Fairchild on the price, the wells or other terms of the investment, but instead trusted Fairchild and Ingram and relied upon their recommendations. After receiving this information, Judge Nixon again contacted Ingram to conclude the transaction, but was told that Fairchild "is the kind of man you cannot push," and that Fairchild "will take his own sweet time."

9. On August 27, 1979 trial of the Boam Co. case began before Magistrate Roper. The case was bifurcated with some claims not involving Fairchild Construction to be tried first. After hearing evidence Magistrate Roper entered certain judgments not involving Fairchild. Judge Nixon approved these judgments on September 6, 1979 as the supervising district judge. In the meantime, on August 28, 1979 a comprehensive settlement in Boam Co. was signed by all parties, including Fairchild. In the settlement Fairchild Construction received $17,000. Judge Nixon and Magistrate Roper by their signatures approved the settlement agreement on September 6, 1979, approved payment of settlement funds on October 12, 1979, and entered an order dismissing Fairchild as a result of the settlement on January 30, 1980.

10. In late February or early March of 1980, Ingram contacted Judge Nixon and arranged a meeting with Wiley Fairchild at the offices of Fairchild Construction in Hattiesburg. At the meeting Judge Nixon entered through Fairchild's private entrance and for the first time met Wiley Fairchild. Nixon explained to Fairchild that he wanted to invest to help educate his children. There was no negotiation on the price, and Fairchild mentioned the three specific wells previously described by Ingram. At the meeting Nixon learned that Fairchild had also put a Mississippi Governor and the Mayor of Hattiesburg in oil deals.

11. At the time of the meeting with Fairchild in late February or early March of 1980, Judge Nixon "definitely" felt he had an agreement with Fairchild to go forward with an oil and gas investment. Judge Nixon knew that the opportunity to invest with Fairchild was not available to the general public. Nixon believed Fairchild wanted to put him in a deal because Fairchild "had heard" of him, "wanted to meet" him, knew he "was a person of good reputation," and Ingram had "recommended" Nixon to Fairchild. During the meeting Fairchild referred to Nixon as "judge."

12. On February 13, 1980 Seymour v. L & A. Contracting Co., et al. was filed in the Southern District of Mississippi. Seymour had suffered terrible injuries in an accident during the demolition and removal of a bridge. Fairchild Construction Co. was the second of five defendants named in the Seymour suit, which sought $6 million in damages.

13. Seymour was originally assigned to Judge Dan Russell. However, Judge Russell recused himself because his nephew was an attorney with the law firm of White & Morse, which represented Fairchild Construction in the case. Accordingly, on March 19, 1980 the case was reassigned to Judge Nixon. On March 20, 1980 three of the defendants filed their own complaint under maritime law seeking exoneration and limitation of liability. Fairchild was not a named party to this second action but was identified in the complaint as a party whose interests might be affected by the case. The limitation action was originally assigned to Judge Cox, but was reassigned to Judge Russell presumably because the case was related to Seymour. The limitation action was consolidated with the Seymour case and assigned to Judge Nixon in May 1980.

14. Judge Nixon rendered preliminary orders in Seymour permitting the withdrawal of counsel and allowing a second amended complaint in June and July of 1980. Following some discovery, on July 11, 1980 Fairchild Construction moved for summary judgment against the plaintiff Seymour. The motion was not opposed by the plaintiff. On September 3, 1980 Judge Nixon granted the motion, and entered findings of fact and conclusions of law in Fairchild's favor.

15. In September 1980, Fairchild Construction moved for summary judgment in Seymour against Brown Engineers, a co-defendant that had filed a cross-claim for contribution and indemnity against Fairchild. This was the only remaining claim involving Fairchild left in the case. The motion was heard by Judge Nixon on November

26, 1980 and denied by the judge per order entered December 4, 1980. As a result, Fairchild Construction remained a party in the Seymour case, but only with indirect, potential liability in the event the plaintiff first obtained judgment against Brown Engineers and it was then determined that Fairchild must indemnify Brown. Counsel for Fairchild Construction apparently advised Judge Nixon at the November 26, 1980 hearing that his client would file a cross-claim against L&A Contracting, and a motion for leave to do so was filed on January 26, 1981.

16. From January 1980 until February 1981, Judge Nixon spoke on the telephone with Wiley Fairchild "several" times but probably less than ten occasions. Judge Nixon believed he had reached a "gentlemen's agreement" to invest with Fairchild at the time of his first meeting with Fairchild in February or March of 1980, but felt the agreement was not "legally effective" or enforceable until documents were signed in February 1981.

17. In late February 1981, Carroll Ingram contacted Judge Nixon at his chambers in Biloxi, and advised Nixon that he would be in Biloxi the next day or the following day. Ingram said that Fairchild had signed instruments of conveyance and that he would bring the documents to Nixon to close out the transaction. Prior to this conversation Judge Nixon had planned on borrowing the necessary funds from a bank to finance the transaction. The judge asked Ingram why he had not given more advance notice so that Nixon could arrange financing. Ingram indicated that Fairchild would finance the matter and charge Nixon "a reasonable rate of interest." Judge Nixon first saw the documentation for the transaction when Ingram brought it to his chambers in Biloxi in late February 1981. Nixon played no role in preparing either the deeds or promissory notes.

18. The deeds were executed by Wiley Fairchild in February 1981, but were backdated to February 25, 1980. The conveyances assign overriding oil and gas royalties in three separate wells to Judge Nixon for stated consideration of ten dollars each. Two of the conveyances are from W.R. Fairchild Construction Co., the party in the Boam Co. and Seymour cases, and one is signed by Fairchild as "Partner and General Manager" of Fairchild Construction. The third conveyance is from Fairchild Windham Exploration Company, a related entity owned by Wiley Fairchild, his brother Rodney Fairchild and Fairchild Construction. The deeds state that the conveyances "are to be effective from the first day of production." For at least one of these wells, Fairchild Construction had a "working interest", as opposed to the

"royalty interest" that was carved out of the Fairchild interest and conveyed to Judge Nixon. The "working interest" gave Fairchild Construction a greater stake in the well by requiring contributions for drilling and operational expenses, allowing participation in some management and operational decisions, and creating the opportunity for greater profits.

19. During his meeting with Ingram in late February of 1981, Judge Nixon executed three promissory notes to finance the oil and gas investment. Judge Nixon paid nothing out-of-pocket for the investment. Instead, the entire purchase price of $9500 was financed through a loan from W.R. Fairchild Construction Co. The loan was unsecured at an interest rate of 10%, with interest and principal repayable on February 25, 1983. The interest rate and terms were set by Fairchild, with no objection from Nixon. Judge Nixon was also entering into oil and gas investments with parties other than Fairchild at this time, financed by bank loans at the then-market rate of 15% with principal and interest to be repaid within 90 days. Although Wiley Fairchild has loaned money to family and makes extensive charitable contributions, neither Fairchild nor his construction company regularly make loans to the general public.

20. The three notes executed by Judge Nixon purport to be signed on February 25, 1980, a year earlier than the actual date of signature. Nixon asked Ingram about the backdating and was told it was customary to date the documents according to the date of the original agreement. Judge Nixon asked Ingram to record the deeds for him and Ingram did so.

21. In May 1981 Judge Nixon again met with Wiley Fairchild at the construction company offices to "keep in touch" and discuss the progress of the wells. Nixon was grateful for the investment opportunity and told Fairchild, "If I can ever help you I will, and if I can't I'll tell you I can't."

22. On February 19, 1982 Judge Nixon began receiving royalty payments from his investments with Fairchild. By March 16, 1982 Nixon had received more than $7,000 in royalty income from Fairchild Construction. The royalty checks were issued from a Fairchild Construction Co. account, with stamped signatures of Wiley Fairchild and his brother, made payable to Judge Nixon. Judge Nixon deposited the checks into a checking account, the Walter L. Nixon, Jr. "Special Account" at the People's Bank of Biloxi. On March 16, 1982 Judge Nixon issued three checks

totalling $5000 out of the People's Bank account to Fairchild Construction as partial pre-payment of his debt, which was not due until February 1983. Judge Nixon has testified that he pre-paid the debt owed to Fairchild Construction to "save some interest." However, Judge Nixon owed substantial sums to commercial banks at 15% and 18% interest at the time he pre-paid the 10% debt owed to Fairchild.

23. On April 16, 1982 Judge Nixon conducted a 30-minute pre-trial conference in Seymour. All counsel were present, including the attorney for Fairchild Construction Co. Judge Nixon advised the parties that the limitation/exoneration issues would be tried first, and directed counsel to explore possible settlement in the case.

24. Counsel in Seymour thereafter negotiated a pre-trial settlement without further participation by Judge Nixon. Seymour received $670,000 in settlement. Fairchild Construction Company contributed nothing to the settlement and was released from all liability. Home Insurance Company, which had selected counsel for Fairchild in the case and held a $500,000 insurance policy on the joint venture between Fairchild Construction and L&A Contracting Co. to demolish the bridge, contributed one-fourth of the settlement. The remainder of the settlement was funded by L&A Contracting Co.

25. The settlement agreement in Seymour was approved by Judge Nixon in a four-page written judgment on May 17, 1982. As of that date Judge Nixon had received $9,553.39 in royalty payments from Fairchild and had repaid $5,000.00 of the $9500 debt.

26. At no time during the proceedings in Boam Co. or Seymour did Judge Nixon ever recuse himself or disclose his relationship with Fairchild to the parties. You may assume that counsel in both cases would state that Judge Nixon showed no favoritism toward any party while presiding over the two cases.

27. Following the conclusion of Seymour and through the present date, Judge Nixon continued to receive royalty payments from his investment with Fairchild, now totalling approximately $73,000. Judge Nixon and Wiley Fairchild on one occasion in October 1982 discussed the possibility of other investments, but no other transactions were ever consummated. Judge Nixon repaid his debt to Fairchild Construction in early 1983. He did not repay interest for the period February 1980 to February 1981 (approximately $950.00) until after the Department of Justice

investigation began and his attorney noticed that interest had been paid only from February 1981.

In addition, before reaching any conclusions please review carefully David Stewart's January 27, 1989 memorandum addressing the propriety of Judge Nixon's involvement in the two cases, and Professor Hazard's letter opinion dated July 22, 1988. Should you find any additional facts in these documents that you believe are relevant, please assume them to be true for purposes of your analysis.

We greatly appreciate your taking the time and effort to consider this matter. If you have any questions, feel free to contact me at (202) 226-3413.

Sincerely,

Peter E. Keith
Assistant Special Counsel

PEK/dw

EXHIBIT 17

STEVEN LUBET

Northwestern University School of Law
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 908-8576

EDUCATION

University of California at Berkeley, School of Law (Boalt Hall), J.D., 1973.

Northwestern University, B.A. History (Phi Beta Kappa), 1970.

PROFESSIONAL POSITIONS

Northwestern University School of Law. Professor of Law, 1981 to present; Associate Professor, 1978-1981; Assistant Professor, 1976-1978; Visiting Assistant Professor, 1975-1976; Northwestern University Legal Clinic, 1975-1986. Subjects taught include Legal Ethics, Criminal Procedure, Law of International Travel, Clinical Practice, Negotiation Workshop, Juvenile Law, Immigration Law, Trial Advocacy, Medical Ethics, Client Counseling, and Pretrial Litigation.

Emory University School of Law. Visiting Professor of Law, 1987-1988. Courses include Legal Profession, Negotiation Workshop, Advanced Litigation, and Trial Advocacy.

American Judicature Society. Fellow, 1983, 1985-87.

National Institute for Trial Advocacy. Director of Expert Witness Programs, 1982 to present; Co-ordinator of Law Firm Programs, 1986 to present. Instructor, Assistant Team Leader and Teaching Team Leader, Midwest Regional, 1978-1986; Director of Midwest Deposition Program, 1988.

Illinois Office of Education. Special Education Hearing Officer, 1978-1981.

Federal Trade Commission. Designated Consumer Representative, 1977-1978. Served as counsel for consumer interests at rulemaking hearings in Chicago and San Francisco.

DePaul University School of Law. Instructor on legal research and writing, 1974-1975.

Legal Assistance Foundation of Chicago. Staff Attorney, 1973-1975. Areas of specialization included consumer protection, welfare law, juvenile law and housing.

[Revised 2/89]

PUBLICATIONS

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Chicago Council of Lawyers.

American Jewish Congress, Co-operating attorney, Commission on Law and Social Action.

B'nai B'rith Anti-Defamation League, Midwest Board of Directors and National Law Committee.

EXHIBIT 18

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515-6216
One Hundred First Congress

February 21, 1989

Professor Andrew Kaufman
Harvard Law School
Cambridge, Massachusetts 02138

Dear Professor Kaufman:

Thank you again for your interest in the impeachment inquiry concerning U.S. District Judge Walter L. Nixon, Jr.

In analyzing whether Judge Nixon's involvement in The Boam Co., et al. v. Dependable Insurance, Co., et al. and Jack N. Seymour, Jr. v. L& A Contracting Co., et al., was consistent with the requirements of the disqualification statute, 28 U.S.C. Section 455, and the Code of Judicial Conduct, you may assume the following facts taken from Judge Nixon's testimony and records in the two cases.

1. The Boam Co., et al. v. Dependable Insurance Co., et al. was initially filed in state court but removed to federal court in November 1977 and assigned to Judge Nixon. The case involved the construction and renovation of pump stations for the sewage system in Gulfport, Mississippi. A number of parties were involved in the litigation, including the City of Gulfport, the prime contractor on the project, a bonding company and various subcontractors and suppliers. On August 25, 1978 W.R. Fairchild Construction Co. Ltd., a subcontractor on the project, moved to intervene in the case to recover $18,600 in fees and materials allegedly owed. Intervention was granted by order dated September 7, 1978 signed by Magistrate John Roper, who was handling non-dispositive pre-trial motions in the case. Magistrate Roper heard other preliminary issues in September and November 1978.

2. On February 13, 1979 Judge Nixon rendered his first orders in The Boam Co., granting certain default judgments to parties other than Fairchild. During February of 1979 Judge Nixon also met with Carroll Ingram, a friend of Nixon's, former state legislator and an attorney who practiced before Nixon. Nixon

advised Ingram that he wanted to supplement his judicial income, and discussed with Ingram the possibility of an oil and gas investment with Wiley R. Fairchild, a client of Ingram's and managing officer and a partner of W.R. Fairchild Construction Co, Ltd. At the time of his meeting with Ingram, Judge Nixon had never met Wiley Fairchild, but knew that he was in the construction business and had often driven past the offices of Fairchild Construction in Hattiesburg. An investment with Fairchild was Judge Nixon's idea, not Carrol Ingram's.

3. After meeting with Ingram, Judge Nixon checked on Wiley Fairchild's reputation and determined that he was a successful businessman with expertise in oil and gas matters. Nixon contacted Ingram again in the spring of 1979 to confirm his interest in any "good" investments Fairchild might have. Nixon told Ingram he could afford to spend approximately $10,000.

4. On May 3, 1979, Judge Nixon heard motions in Boam Co. involving parties other than Fairchild Construction. On May 23, 1979 Dependable Insurance Co., a party defendant in Boam Co., moved for summary judgment against Fairchild Construction. Dependable filed similar motions against the other intervening parties. Copies of the summary judgment motions and supporting materials were delivered directly to Nixon's chambers. Fairchild Construction did not respond in writing to the summary judgment motion.

5. After his conversation with Ingram in the spring of 1979, Judge Nixon contacted Ingram "a couple of times" to check on the possible investment with Fairchild. In the summer of 1979, Ingram told Nixon that he had spoken with Wiley Fairchild, and that Fairchild would be "delighted" to put Nixon in mineral interests. Ingram indicated he would again contact the judge after he had the opportunity to talk with Fairchild in more detail.

6. On June 5, 1979 Judge Nixon referred the Boam Co. case to Magistrate Roper, but continued to handle pending matters. Judge Nixon entered orders applicable to parties other than Fairchild on June 8, 13 and 19, 1979. A formal order of reference was entered in the case on July 9, 1979, signed by Judge Nixon and consented to by four of the parties but not Fairchild Construction. The order of reference authorized trial and a final decision by a magistrate, but noted the presiding district judge would enter judgment "if appropriate, upon review of the proceedings."

7. On August 9, 1979 Judge Nixon entered a written order denying Dependable's summary judgment motion against Fairchild Construction as "not well taken." Judge Nixon entered similar orders denying Dependable's summary judgment motions against the other intervening subcontractors. There is no record that any of the summary judgment motions were ever argued orally before the court.

8. In late 1979 Judge Nixon again spoke with Ingram concerning the investment with Fairchild. Ingram told Nixon that he had spoken with Fairchild and identified three specific wells Fairchild was offering. Ingram also indicated that the cost would be $9500. Judge Nixon did not negotiate with either Ingram or Fairchild on the price, the wells or other terms of the investment, but instead trusted Fairchild and Ingram and relied upon their recommendations. After receiving this information, Judge Nixon again contacted Ingram to conclude the transaction, but was told that Fairchild "is the kind of man you cannot push," and that Fairchild "will take his own sweet time."

9. On August 27, 1979 trial of the Boam Co. case began before Magistrate Roper. The case was bifurcated with some claims not involving Fairchild Construction to be tried first. After hearing evidence Magistrate Roper entered certain judgments not involving Fairchild. Judge Nixon approved these judgments on September 6, 1979 as the supervising district judge. In the meantime, on August 28, 1979 a comprehensive settlement in Boam Co. was signed by all parties, including Fairchild. In the settlement Fairchild Construction received $17,000. Judge Nixon and Magistrate Roper by their signatures approved the settlement agreement on September 6, 1979, approved payment of settlement funds on October 12, 1979, and entered an order dismissing Fairchild as a result of the settlement on January 30, 1980.

10. In late February or early March of 1980, Ingram contacted Judge Nixon and arranged a meeting with Wiley Fairchild at the offices of Fairchild Construction in Hattiesburg. At the meeting Judge Nixon entered through Fairchild's private entrance and for the first time met Wiley Fairchild. Nixon explained to Fairchild that he wanted to invest to help educate his children. There was no negotiation on the price, and Fairchild mentioned the three specific wells previously described by Ingram. At the meeting Nixon learned that Fairchild had also put a Mississippi Governor and the Mayor of Hattiesburg in oil deals.

11. At the time of the meeting with Fairchild in late February or early ~~March of~~ 1980, Judge Nixon "definitely" felt he had an agreement with Fairchild to go forward with an oil and gas investment. Judge Nixon knew that the opportunity to invest with Fairchild was not available to the general public. Nixon believed Fairchild wanted to put him in a deal because Fairchild "had heard" of him, "wanted to meet" him, knew he "was a person of good reputation," and Ingram had "recommended" Nixon to Fairchild. During the meeting Fairchild referred to Nixon as "judge."

12. On February 13, 1980 Seymour v. L & A. Contracting Co., et al. was filed in the Southern District of Mississippi. Seymour had suffered terrible injuries in an accident during the demolition and removal of a bridge. Fairchild Construction Co. was the second of five defendants named in the Seymour suit, which sought $6 million in damages.

13. Seymour was originally assigned to Judge Dan Russell. However, Judge Russell recused himself because his nephew was an attorney with the law firm of White & Morse, which represented Fairchild Construction in the case. Accordingly, on March 19, 1980 the case was reassigned to Judge Nixon. On March 20, 1980 three of the defendants filed their own complaint under maritime law seeking exoneration and limitation of liability. Fairchild was not a named party to this second action but was identified in the complaint as a party whose interests might be affected by the case. The limitation action was originally assigned to Judge Cox, but was reassigned to Judge Russell presumably because the case was related to Seymour. The limitation action was consolidated with the Seymour case and assigned to Judge Nixon in May 1980.

14. Judge Nixon rendered preliminary orders in Seymour permitting the withdrawal of counsel and allowing a second amended complaint in June and July of 1980. Following some discovery, on July 11, 1980 Fairchild Construction moved for summary judgment against the plaintiff Seymour. The motion was not opposed by the plaintiff. On September 3, 1980 Judge Nixon granted the motion, and entered findings of fact and conclusions of law in Fairchild's favor.

15. In September 1980, Fairchild Construction moved for summary judgment in Seymour against Brown Engineers, a co-defendant that had filed a cross-claim for contribution and indemnity against Fairchild. This was the only remaining claim involving Fairchild left in the case. The motion was heard by Judge Nixon on November

26, 1980 and denied by the judge per order entered December 4, 1980. As a result, Fairchild Construction remained a party in the Seymour case, but only with indirect, potential liability in the event the plaintiff first obtained judgment against Brown Engineers and it was then determined that Fairchild must indemnify Brown. Counsel for Fairchild Construction apparently advised Judge Nixon at the November 26, 1980 hearing that his client would file a cross-claim against L&A Contracting, and a motion for leave to do so was filed on January 26, 1981.

16. From January 1980 until February 1981, Judge Nixon spoke on the telephone with Wiley Fairchild "several" times but probably less than ten occasions. Judge Nixon believed he had reached a "gentlemen's agreement" to invest with Fairchild at the time of his first meeting with Fairchild in February or March of 1980, but felt the agreement was not "legally effective" or enforceable until documents were signed in February 1981.

17. In late February 1981, Carroll Ingram contacted Judge Nixon at his chambers in Biloxi, and advised Nixon that he would be in Biloxi the next day or the following day. Ingram said that Fairchild had signed instruments of conveyance and that he would bring the documents to Nixon to close out the transaction. Prior to this conversation Judge Nixon had planned on borrowing the necessary funds from a bank to finance the transaction. The judge asked Ingram why he had not given more advance notice so that Nixon could arrange financing. Ingram indicated that Fairchild would finance the matter and charge Nixon "a reasonable rate of interest." Judge Nixon first saw the documentation for the transaction when Ingram brought it to his chambers in Biloxi in late February 1981. Nixon played no role in preparing either the deeds or promissory notes.

18. The deeds were executed by Wiley Fairchild in February 1981, but were backdated to February 25, 1980. The conveyances assign overriding oil and gas royalties in three separate wells to Judge Nixon for stated consideration of ten dollars each. Two of the conveyances are from W.R. Fairchild Construction Co., the party in the Boam Co. and Seymour cases, and one is signed by Fairchild as "Partner and General Manager" of Fairchild Construction. The third conveyance is from Fairchild Windham Exploration Company, a related entity owned by Wiley Fairchild, his brother Rodney Fairchild and Fairchild Construction. The deeds state that the conveyances "are to be effective from the first day of production." For at least one of these wells, Fairchild Construction had a "working interest", as opposed to the

"royalty interest" that was carved out of the Fairchild interest and conveyed to Judge Nixon. The "working interest" gave Fairchild Construction a greater stake in the well by requiring contributions for drilling and operational expenses, allowing participation in some management and operational decisions, and creating the opportunity for greater profits.

19. During his meeting with Ingram in late February of 1981, Judge Nixon executed three promissory notes to finance the oil and gas investment. Judge Nixon paid nothing out-of-pocket for the investment. Instead, the entire purchase price of $9500 was financed through a loan from W.R. Fairchild Construction Co. The loan was unsecured at an interest rate of 10%, with interest and principal repayable on February 25, 1983. The interest rate and terms were set by Fairchild, with no objection from Nixon. Judge Nixon was also entering into oil and gas investments with parties other than Fairchild at this time, financed by bank loans at the then-market rate of 15% with principal and interest to be repaid within 90 days. Although Wiley Fairchild has loaned money to family and makes extensive charitable contributions, neither Fairchild nor his construction company regularly make loans to the general public.

20. The three notes executed by Judge Nixon purport to be signed on February 25, 1980, a year earlier than the actual date of signature. Nixon asked Ingram about the backdating and was told it was customary to date the documents according to the date of the original agreement. Judge Nixon asked Ingram to record the deeds for him and Ingram did so.

21. In May 1981 Judge Nixon again met with Wiley Fairchild at the construction company offices to "keep in touch" and discuss the progress of the wells. Nixon was grateful for the investment opportunity and told Fairchild, "If I can ever help you I will, and if I can't I'll tell you I can't."

22. On February 19, 1982 Judge Nixon began receiving royalty payments from his investments with Fairchild. By March 16, 1982 Nixon had received more than $7,000 in royalty income from Fairchild Construction. The royalty checks were issued from a Fairchild Construction Co. account, with stamped signatures of Wiley Fairchild and his brother, made payable to Judge Nixon. Judge Nixon deposited the checks into a checking account, the Walter L. Nixon, Jr. "Special Account" at the People's Bank of Biloxi. On March 16, 1982 Judge Nixon issued three checks

totalling $5000 out of the People's Bank account to Fairchild Construction as partial pre-payment of his debt, which was not due until February 1983. Judge Nixon has testified that he pre-paid the debt owed to Fairchild Construction to "save some interest." However, Judge Nixon owed substantial sums to commercial banks at 15% and 18% interest at the time he pre-paid the 10% debt owed to Fairchild.

23. On April 16, 1982 Judge Nixon conducted a 30-minute pre-trial conference in Seymour. All counsel were present, including the attorney for Fairchild Construction Co. Judge Nixon advised the parties that the limitation/exoneration issues would be tried first, and directed counsel to explore possible settlement in the case.

24. Counsel in Seymour thereafter negotiated a pre-trial settlement without further participation by Judge Nixon. Seymour received $670,000 in settlement. Fairchild Construction Company contributed nothing to the settlement and was released from all liability. Home Insurance Company, which had selected counsel for Fairchild in the case and held a $500,000 insurance policy on the joint venture between Fairchild Construction and L&A Contracting Co. to demolish the bridge, contributed one-fourth of the settlement. The remainder of the settlement was funded by L&A Contracting Co.

25. The settlement agreement in Seymour was approved by Judge Nixon in a four-page written judgment on May 17, 1982. As of that date Judge Nixon had received $9,553.39 in royalty payments from Fairchild and had repaid $5,000.00 of the $9500 debt.

26. At no time during the proceedings in Boam Co. or Seymour did Judge Nixon ever recuse himself or disclose his relationship with Fairchild to the parties. You may assume that counsel in both cases would state that Judge Nixon showed no favoritism toward any party while presiding over the two cases.

27. Following the conclusion of Seymour and through the present date, Judge Nixon continued to receive royalty payments from his investment with Fairchild, now totalling approximately $73,000. Judge Nixon and Wiley Fairchild on one occasion in October 1982 discussed the possibility of other investments, but no other transactions were ever consummated. Judge Nixon repaid his debt to Fairchild Construction in early 1983. He did not repay interest for the period February 1980 to February 1981 (approximately $950.00) until after the Department of Justice

investigation began and his attorney noticed that interest had been paid only from February 1981.

In addition, before reaching any conclusions please review carefully David Stewart's January 27, 1989 memorandum addressing the propriety of Judge Nixon's involvement in the two cases, and Professor Hazard's letter opinion dated July 22, 1988. Should you find any additional facts in these documents that you believe are relevant, please assume them to be true for purposes of your analysis.

We greatly appreciate your taking the time and effort to consider this matter. If you have any questions, feel free to contact me at (202) 226-3413.

Sincerely,

Peter E. Keith

Peter E. Keith
Assistant Special Counsel

PEK/dw

EXHIBIT 19

BEFORE THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
U. S. HOUSE OF REPRESENTATIVES

In the Matter of: An Impeachment Inquiry concerning U. S. DISTRICT JUDGE WALTER L. NIXON, JR.	H. Resolution 407 (100th Congress, 1988 Session)

The deposition of JOHN MARLIN ROPER, taken by Counsel for the Committee on the Judiciary, by William L. Warren, Court Reporter, in the Grand Jury Room, First Floor, U. S. Federal Courthouse, Biloxi, Mississippi, on the 19th day of December, 1988, commencing at the hour of 4:41 p.m.

oOo

COUNSEL PRESENT:

PAMELA NAUGHTON, Attorney
PETER KEITH, Attorney
Committee on the Judiciary
U. S. House of Representatives
Washington, D. C.

PROCEEDINGS

MR. KEITH: Judge Roper, this is a deposition being taken in connection with the impeachment inquiry concerning Judge Walter Nixon, that is being currently conducted by the Committee on the Judiciary of the House of Representatives.

Whereupon,

JOHN MARLIN ROPER

appeared as a witness herein, and having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. KEITH:

Q Why don't we begin by having you state your full name for the record, sir?

A My name is John Marlin, M-a-r-l-i-n, Roper, R-o-p-e-r.

Q And you're currently a U. S. Magistrate here in the U.S. District Court?

A Yes, I'm currently a full time United States Magistrate for the Southern District of Mississippi.

Q Can you describe for us briefly what your legal experience has been since you passed the bar exam?

A All right. I finished Tulane Law School -- actually I finished Auburn University in 1964, attended Tulane Law School beginning in 1965, three years, I graduated from

Tulane. I worked as a counselor and director for a juvenile delinquency home in New Orleans while in law school and immediately after law school.

Went back to Alabama, which is where I'm from, Greenville, Alabama, took the bar exam, went into six months active duty with the National Guard, which I was a member of, after I finished law school, completed that in the summer of 1969.

At that time I was employed as law clerk to Judge Walter Nixon, Southern District of Mississippi with a three-year commitment to him. After the third year, I remained with him because of the possibility then of a full time United States Magistrate's position being established, we had only part time magistrates beginning in the early 1970's. That did come about. In the meantime I had also taken the Mississippi bar exam and passed it, so I was eligible for the position. I was appointed full time magistrate in 1974, took office in I believe August of 1975 and have been full time United States Magistrate since that time.

Q Okay. Can you describe for us briefly what the duties of a magistrate are, in your experience?

A It was the desire of the district judges, and there were three of them, Judge Nixon, Judge Van M. Russell, Jr. and Judge Harold Cox, to have a magistrate who would be able to try civil cases.

Because of my experience in the courtroom, federal courtroom, as a law clerk to Judge Nixon, I had gained experience in how to try federal cases, so I began with a two-week calendar I think the week after I was appointed. My primary duty over the last 14 years I guess almost, has been to try civil cases. That is, try cases by consent, or try cases based upon the recommendation to the District Judge.

I also handle all the discovery. At the time when I was the only magistrate, I handled all the discovery for the entire district. We have two other magistrates now, so we share all of discovery. We review Social Security appeals, we handle all the habeas corpus, all the 1983 cases on prisoner complaints. In addition, we handle the misdemeanor court which includes the Natchez Trace, Gulf Island National Seashore, Seabee base and Keesler Air Force Base, as well as the VA Hospitals, for misdemeanor court.

Those are basically the duties. We handle all the pre-trials for both civil and criminal cases.

Q Okay, and when you say you handle discovery and pre-trial in civil cases, would that also include cases in which you were not assigned to handle them, either through consent or through referral?

A Yes, the district judges, both then and now, do not handle any discovery. It's more formalized now than under the original Magistrates Act, magistrates were authorized to handle discovery and did so. In this district, we've handled all of discovery from the very beginning of the case up until the time it actually went to trial. Normally the magistrate will also pre-try the case.

Q Since you mentioned the question of consent and referral in your capacity as a magistrate and since that bears some relevance to the case that I'm going to be asking you about, perhaps you could explain to us what the difference is in your experience and what that means in terms of what your responsibilities are vis-a-vis what they district judge, U. S. district judge, would be doing.

A Under the original Act, there was no specific statutory authority for magistrates to try cases. It was a catchall provision which allowed magistrates to do anything not inconsistent with the Constitution and laws of the United States. That's basically the authority for it.

For a number of years, magistrates did try cases. Eastern District of Louisiana was one of the leaders in the nation and Judge Sear, who came over here as a Special Master. The judges like that, so they adopted the Eastern District's procedures. So from the time I began, I began trying cases. Basically lawyers simply would sign a consent form and then I would try the case and enter a judgment and it would be appealed to the Fifth Circuit.

There was no formalized procedure. That began to be questioned in the mid-'70's to late '70's as to whether or not without specific statutory authority a magistrate could try a case. One of my cases was reversed and as a result we had the '79 Magistrates Act which gave specific authority to a magistrate to be able to try a civil case. It provided for an appeal either to the Fifth Circuit or to the District Judge, depending what the parties desired.

So after the end of '79, from '80 on, magistrates throughout the country have tried cases. Now that Act was challenged and it was determined to be constitutional by the Supreme Court.

So my trial of cases would be normally by consent of the parties and at some point in time we also required an order of reference from the District Judge. I cannot recall whether that was before or after '79, but at some point we also required that.

Either by consent of the parties I would try cases, always jury cases would be by consent of the parties, and non-jury cases would be normally by the consent of the parties but some would be by order of reference. We have a much more formalized procedure after the '79 Act for order of reference. It was a little looser before that, sometimes it would simply be an oral reference, to some extent, and I would report back by recommendation. That recommendation would be reviewed by the District Judge and he made the decision de novo based upon the recommendation. Recommendations were normally in Title VII cases, which could be referred after I believe 120 days if no action had been taken. Prison cases were also a source of a number of recommendations, because prisoners usually won't consent to anything.

Q Okay. With regard to consent cases, what was your practice in your experience in the docket that you handled in terms of how that consent would be reflected. You mentioned a consent form.

A It should be -- parties -- and this was the requirement -- parties should sign a consent form. Now it was more formalized after the '79 Act which specified exactly that the court could not interfere in any way, in an attempt to persuade parties to consent one way or the other. What was adopted was a consent form is sent to the parties after the case is filed and they simply file it without the court knowing anything about it. Before '79, it was probably less informal, they may have received a copy of a consent form or prepared their own consent form at the time of trial.

But it should have been -- any case in which a magistrate tried the case from the very beginning of my experience as magistrate, should have been done with a consent form and that consent form should have been filed.

Q Would it be possible, in your experience, for there simply to be oral consent of the parties prior to trial or was it usually done through a --

A It was usually done with a written consent but it's possible that you would have the consent; that is, they agreed to it at pre-trial and then it not be checked at the time of trial to make sure the formal document had been filed. We had experiences of that occurring; in fact, I believe the Fifth Circuit now requires that before you begin a trial, you state on the record, this is a consent case tried before a United States Magistrate and all the parties have to stand up and acknowledge that. That's because the Fifth Circuit, and I assume other circuits as well, have experienced problems where everybody agrees to it orally and for one reason or another the actual consent form does not get entered on the docket. Either it's not signed or it's not filed.

Q And when you are handling a case through consent of the parties, let's say in the late '70's for example, what would the role of the district judge be in such a case? Would he have any supervisory -- any retained supervisory responsibility?

A No, none. He was happy for me to take the case. We had such a caseload then that that is why they desired magistrates to try cases. Three district judges simply could not handle the caseload. So that was the reason magistrates became trial judges, because we were able to help with the case load. But once the case was assigned by consent, the district judge rarely had any involvement with it whatsoever, after consent.

Q So that as a general rule in consent cases, once you began handling the case, you wouldn't go back to the district judge for approval or judgments or orders or anything like that?

A I may go back to him for approval of a judgment, as I explained earlier on the record. At that time in '78 or '79, there began to be some concern about whether or not magistrates could try cases, whether they could enter judgments. There was a period in there which on most cases, even though I may have had consent, I might have obtained approval of a district judge on the final judgment in a case, just because I was not sure of the state of the law and did not want a case which you had tried for a long time or a case in which the parties had agreed to a resolution of it, to come back simply because it had the wrong signature on it. But the district judge would play no role in that other than simply to sign or approve what the magistrate had already done.

Normally he would not sign the judgment, but there was a period in time and it was right before Congress acted in '79, that at least I did -- I sought the district judges' approval even on consent cases. Now reference cases of course he would enter the judgment himself.

Q That was my next question. Cases that were referred to you through the district judge, I gather the district judge would continue to have supervisory authority and to the extent there was anything dispositive that had to be taken care of in the case, that would be handled through the district judge.

A To some extent that's true. After a case was referred, then he would approve everything that's done. You wouldn't necessarily go to him for what might be a dispositive motion during the course of the trial. If you got a motion for directed verdict or -- although it may be considered dispositive, you would not break the trial in order to go to the district judge, even on a referral for recommendation case. He would approve everything at once that was done during the trial. Normally before the trial, on a summary judgment or something like that, it was usually handled by the district judge until such time as he tried the case.

Q So that in reference cases, you might proceed to make rulings in discovery issues or whatever?

A I would make all rulings on discovery.

Q Okay, but if it came time for say a dispositive summary judgment motion, that would be the district judge?

A It would normally be before the district judge on a dispositive ruling. It depends on when the actual referral occurred. It could be that you would make that ruling and that would still be a part of the record. He would just consider everything at once -- so it went both ways.

On a consent case, after the consent was given and it was determined that the magistrate would try it, he would handle everything, including the dispositive motions.

You have to understand too that you could refer even a consent -- even a motion. A motion could be referred and the parties could consent to the magistrate just to hear that motion. You may not try the case but just hear that motion. So that's another manner in which magistrates are used.

Q Okay. What was --

A Much more formalized though after '79.

Q What was the practice in your district with regard to reporting, court reporting of pre-trial motions in civil cases? To what extent was a court reporter present to either hear argument or --

A A court reporter was usually called for in regards to a motion in which testimony was being taken. It was not the normal practice to have a court reporter present to hear a -- certainly a non-dispositive motion. Those are normally heard in chambers. As well as dispositive motions, they were normally heard in chambers without a court reporter being present. If a court reporter is required or if it was a significant type case. An asbestos case, for example. Even though there may not have been testimony, but because of the multitude of those cases and the need to know rulings as they applied to future cases, that might be recorded. But the normal situation would not be to record either -- certainly not a non-dispositive motion that did not require testimony and probably not a dispositive motion unless it was an injunction, temporary restraining order. Just a normal summary judgment or motion to dismiss would not be recorded.

Q Okay. And as I understand it, there came to be used a Deputy Clerk's form that reflected both the presence of a Deputy Clerk in those pre-trial motion hearings, that they would record the results --

A I think that has always been -- ever since I've been with the court, a courtroom deputy or deputy clerk has been present for all motions. He sets forth what occurs, who is there, what the judge's ruling is. That's formalized in much more detail by the ultimate order that comes out of the particular hearing. Whether that's prepared by the court -- sometimes it is, sometimes it's prepared by the parties and they send the order back in for the signature of the judge. But there is a document called a Deputy Clerk sheet that is prepared that is supposed to be filed in every case in which a motion is heard.

Now there may not be a Deputy Clerk sheet for uncontested motions. The attorneys will simply send in an order for additional time to answer, they do not necessarily require a hearing. We've switched now to most motions being submitted and just decided by the court without even a hearing, and there will not be a Deputy Clerk sheet for a motion that's decided on briefs.

Sometimes dispositive motions, even back then, were decided on the briefs if the parties did not desire oral argument. Our rule, I guess until two or three years ago, was that if either side desired oral argument, the court would grant it.

Q Okay.

A That's not the rule now. We adopted the Northern District rule for the sake of uniformity.

Q Let me turn now to your relationship with Judge Nixon.

A All right.

Q I gather that since you served as his law clerk for several years and have worked with him here on the federal bench, that you had a close relationship with Judge Nixon?

A I did, I had a very close relationship with Judge Nixon. He brought me into the court system. I certainly give him full credit for training me in how to become a judge, hopefully a good judge.

Q Was that strictly a professional relationship or did it also have a social side to it?

A Primarily on a professional basis only. I certainly saw Judge Nixon obviously every day when I worked for him but as magistrate we worked in the same building. He was the only other district judge in Biloxi, there was a district judge in Gulfport. But we were in the same building, we were on the same intercom system, so I normally talked to him certainly two or three times a week. We would have lunch together. We did not socialize that much on the outside. Maybe it was because we were tired of seeing each other during the week, but -- he is a hunter, I'm not a hunter, so we didn't share the same enthusiasm for hunting, which is one of his primary forms of recreation.

We did go fishing together I believe on two occasions. I have been in his home, usually go for a Christmas party, and he has been at mine. But that would be the extent of our social relationship, although I do consider us to be good friends.

Q Did Judge Nixon ever discuss his personal financial affairs with you, either business investments that he had or business transactions he was involved in?

A No. I suppose as his law clerk I was familiar sometimes with what was going on, but nothing specific. The secretary handled it or he handled it. I never, certainly since I became magistrate in '75, I have absolutely no idea about his financial investments. We never had any joint investments, never was involved with any financial transaction. He never really discussed exactly how he was investing his money. Certainly he was concerned about the inadequate salary, as was I, and continue to be. Hopefully two more months things might change.

Q If not $135,000 at least a good chunk of it.

A At least a good chunk of it, that's correct.

Q Let me ask you with specificity about a fellow by the name of Wiley Fairchild.

A All right.

Q Did Judge Nixon ever indicate to you that he had a financial relationship with Mr. Fairchild?

A No.

Q Have you ever met Mr. Fairchild personally yourself?

A I've never met Mr. Fairchild to my knowledge. My first remembrance of Mr. Fairchild is seeing him on TV after all this began. I did not recognize him at that time, so I'm not aware of ever having met Mr. Fairchild, although I've met a lot of people and possibly met him somewhere, but I don't recall it.

Q Okay. So that as I understand it, prior to the publicity surrounding the Department of Justice investigation and ultimately Judge Nixon's indictment and trial, you were not aware that he had oil and gas investments with Mr. Fairchild?

A No. He never discussed his oil and gas investments with Mr. Fairchild with me.

Q Let me turn now to a case which you and I have reviewed a little bit off the record before this deposition, and that's a case that's captioned the Boam Company, B-o-a-m, et al v. Dependable Insurance Company, et al, Case Number S77-0388.

Do you recall anything about this case today, both from having looked at --

A I'll tell you, my recollection of that case is very simple -- of course we've gone over the docket sheets and I'm sure we'll get into the rest of it -- the only thing I can say I actually recall about that case was that I began trial on it and decided to try it in phases; that is, there were a number of subcontractors involved in this particular Gulfport sewage system and the dispute emanating from that. And I tried one first -- I don't remember the name of which one I tried first, but the attorney I believe -- you've refreshed my memory -- was Larry Lenoir. And I decided the first phase of the case against him. At that time the case -- I remember the attorneys asking for time. Whether or not I worked with them or whether they worked separately, the remainder of the case was settled.

I always recall Lenoir saying he wished he hadn't been the first one to have his portion of the case tried, because everyone else was able to participate in the settlement and all he got was a judgment.

So that's my only real recollection of that case, is his -- is this attorney's concern over the fact that his portion was tried first and I decided it against him and he missed out on some of the settlements of the other parties. But I have no specific recollection of anything else much about the case.

Q Okay. You and I have reviewed the docket sheet and some of the pleadings in the case --

A Yes.

Q -- do you recall today whether that was a consent case or a referral case?

A No, I don't. We tried to establish that -- let me say first, I would have handled all of the discovery in the case. That would be -- there was not but one magistrate handling the Southern Division discovery in 1977 through the appointment of a third magistrate in about '82 or '83. So anything that was non-dispositive, I would have handled simply because that was my job to handle it.

We looked at the -- at least the pre-trial docket sheet which says case referred to Judge Roper, as I recall the docket sheet that we looked at. And that was at the time of pre-trial. That would normally mean that the parties had consented for me to try the case. This type of case, I probably would have tried by consent of the parties, although it could have been a case referred to me. But from just looking at what we had, it would be more likely a case in which there had been consent. I'm aware there is not a consent form in there and I can't explain that. It may be because it was a referred case -- I can't explain where the consent form would be.

I can say in a case like this though the consent form probably would not have been signed until the day of trial because you had attorneys from all over, and they probably would have signed the consent form the day of trial and it was a case that was obviously supposed to last for a number of days. Fortunately it resolved itself after one day's hearing on one of the issues, so it was -- whether they did not complete the consent form or whether they completed the consent form and gave it to my clerk and it was not filed because the case was settled, or whether or not it was a referral case for recommendation, I can't tell you from looking at the docket sheet which doesn't reflect it. It may be in the transcript, as I told you, of the opinion. I think I recall entering a bench opinion on it, so it could be either at the start of the trial that reference was made as to whether or not it was a consent case or not, or I could have, in dictating the opinion, stated whether or not it was a consent case.

But there is a judgment entered, if I signed the judgment -- it doesn't reflect on the docket sheet, but if you can find that judgment and if I signed it, I was probably signing it as a consent judge to try the case without it being a reference case for referral. I cannot tell you now because I don't remember. YOu and I have looked at the docket sheet and I just can't tell from that without the forms being there.

Q Sure. I understand. If I could go through with you some of the pleadings in the case and some of these Deputy Clerk forms just so that we can understand perhaps the progress of the case as it developed.

A All right.

Q I note a Deputy Clerk's form dated 9/7/78 that indicates that you presided over a motion to intervene with an appearance by an attorney by the name of Bruce Aultman.

A Yes, he's an attorney from Hattiesburg.

Q Okay, and the docket sheet indicates that Mr. Aultman was representing Fairchild Construction Company in the case. Do you recall today there being issues dealing with that defendant in the case?

A Until you pointed out to me today that Fairchild Construction Company was a defendant, I did not even recall that.

Q Okay.

A There were a number of defendants in the case, but that Fairchild was one of them is something I did not know until today -- did not recall. I'm sure I probably knew it at the time, but I simply didn't -- I did not make the connection through all of the --

Q And then there's another Deputy Clerk's form dated May 3, 1979 that indicates that Judge Nixon handled certain motions in the case.

A That would have been before the case was assigned to me either by reference or by consent more than likely, because he would be handling the dispositive motions. I'm not aware of that particular hearing, I was not there for it and that's about all I can say. It looks like, just from reading it, he heard motions for summary judgment, took them under advisement. Granted one motion for dismissal and took one under advisement, but I'm not aware of that proceeding.

Q And so the previous Deputy Clerk's form that we looked at and your handling a motion to intervene, would that have been done in your capacity as a magistrate simply handling regular pre-trial matters --

A Handling non-dispositive motions.

Q Prior to any decision being made on it being a consent case or a referral.

A Yes, it would have been. At this juncture we're talking about, I would have been handling all the non-dispositive discovery matters and Judge Nixon would have been handling all the dispositive matters.

Q Okay, and then I note another Deputy Clerk's form dated August 20 of '79 indicating that you were presiding over a motion to strike a counter-claim of one of the defendants.

A Right, that would have been considered non-dispositive at that time.

Q And then there is a Deputy Clerk's form of June 5 of '79 and I gather --

A This is out of order.

Q That's right, this would have been preceding the hearing that I guess is described as a pre-trial conference.

A Yes. At that time, magistrates were pre-trying all cases, both for Judge Nixon and Judge Russell. Judge Cox did not believe in pre-trial, so he did not have pre-trials in his cases.

Q Okay.

A Which made it very interesting when you tried to pick a jury in one of his cases.

Q If you could take a look at the last paragraph on this particular form, June 5 of '79. There's a reference here, "The court noted it would consider motions for summary judgment," and then the final sentence, "The District Judge may decide these motions."

A My thought would be that at this pre-trial it was perhaps discussed that I would take over the case. This makes me think even more it must have been a consent case. It may be some motions that Judge Nixon already had under advisement or perhaps -- I don't know what that means, it may be that he was going to go ahead and let them file the motion before him and I would try the case, I don't know -- I don't know what that means.

It would not have been unusual though for, as you approach the trial date, which I see is set for July 9, to -- if he already had some of the motions which had already been filed, for him to go ahead and decide them or decide to go ahead and let him hear some of the motions that he had already been working on. But by it says "The Court noted it would consider motion for summary judgment," it must have been -- discussed at that time that I was going to perhaps try the case.

Q I note that this hearing would have been about a month before the actual trial date that was scheduled.

A That's about right.

Q And the phrase "The District Judge may decide these motions.", based upon your experience would it have been a situation where perhaps it had not been decided whether it was going to be a consent or a referral case?

A Could well be. I can't recall, I don't know why that's in there. As I said, it's either that motions had been filed before him and not decided -- it may be that all the parties had not decided at this time whether or not they would consent, maybe they needed it -- sometimes at pre-trial the attorneys will have to go back and consult with their principals as to whether or not they'll consent to trial by magistrate. And the attorneys may tentatively consent and then with the idea that they're going to go back and you may have one party that doesn't consent. If that's the case, then it would have been decided by the district judge, if I didn't get full consent. So that may have been -- I frankly don't know, I can't tell you for sure.

I want to note that Michael McPhail at that time was my law clerk as opposed to being courtroom deputy, so -- magistrates did not have courtroom deputies or deputy clerks, we had secretaries and we had law clerks. So the law clerk would double sometimes as a courtroom deputy and the secretary would be the courtroom deputy sometimes in the courtroom, and a law clerk, who, as McPhail, was with me for six months, his notes may not have been the greatest. I hate to say that about a lawyer, but he may not have known exactly what a deputy clerk should do. I did want to note who the deputy clerk was and that was not a deputy clerk, it was my law clerk.

What happened is in order to have a law clerk, magistrates were able either to choose between a courtroom deputy or a law clerk, and because I tried so many cases I naturally chose a lawyer to be in the position of the courtroom deputy in effect. We now have law clerks and also have courtroom deputies assigned to us, but we did not in

1979. That may be why the consent wasn't filed too.

Q And then there's another Deputy Clerk's form August 9 of '79.

A Okay.

Q Again indicating that you presided.

A All motions denied, I assume by me. This is where I -- it looks at this point in time like I'm deciding both dispositive and non-dispositive, which makes me think even more that it was going to be a consent case, or was a consent case.

I vacated a default judgment I see there. I've decided to bifurcate the claims between Dependable and Newkirk. That was what I was explaining earlier, my only real recollection is this bifurcation here. the first party lost and was not able to participate in the settlement.

Q These unfortunately are out of order but another one June 5 of 1979, this would have been a matter handled by Judge Nixon.

A Judge Nixon sometimes did pre-try his own cases and this looks like this may have been a case in which -- I say not a particular case, he would handle the whole pre-trial calendar, sometimes he would refer it to the magistrate, sometimes he would not, normally he would. It looks like he conducted a pre-trial in this one and decided to refer it to me.

Q Okay, does the -- and the word "referred" here is used. Was that a term of art such that we can get clear that at least at this point in time it was a referral case rather than a consent case?

A No, I would say referred probably meant consent, referred back then was probably saying he was referring it to me for trial, because cases like that were normally referred with the consent of the parties. That's back in March --

Q This would be June of 1979.

A June, okay. Well I would think at that time the parties may have indicated a desire to proceed before me.

What would happen is when you had a case that was going to consume a great deal of time on the calendar, those were cases that would certainly be red flags for referral either by referral by consent or referral by a recommendation to the magistrate, rather than take up the whole calendar. But referred should not be -- is not an indication that it was a recommendation type case, it may have been. As I've told you, I don't recall. And the lack of consent concerns me, as to why it was not entered, but looking at the docket sheets, and this is the first time we've been over each one of these, we didn't do that this morning -- it would seem like I took control of the case and that would normally be a case which was by consent. I was proceeding at least with the idea that I had consent of the parties, whether it had been formally entered or not -- apparently it had not.

Q Okay. Do you recall anything about Judge Nixon assigning the case to you for reasons of recusal or for reasons of conflict of interest or because of some relationship he had with any of the parties?

A I don't recall why he referred it to me. I don't have any recollection of that. I think I would recall if he used those words -- looks like I would recall if it had been for some reason, but I don't recall him ever discussing Wiley Fairchild or Fairchild Construction or anything prior to all this occurring later in the '80's.

Q I understand.

A I have no recollection of discussing that was the reason. More than likely it was because of the fact that I handled the sewage case in Waveland and had perhaps become an expert in sewage. It had taken quite a long time to try that case. I think that was maybe one of the reasons I was referred that case in addition to the fact it was a long nasty dog case, a non-jury -- I seem to get a lot of those.

Q All of those reasons would make it very attractive for the judge --

A Make it very attractive to refer to someone else, that's exactly right.

Q Okay, and then directing your attention to the Deputy Clerk sheet that reflects that you actually began the trial of the case in August of 1979, you've mentioned that to us.

A Yes.

Q And that aside from the judgment entered against the first defendant, the other parties settled out.

A That's right. I don't recall whether or not -- what part I played in the settlements after the initial opinion, whether or not I played an active role or whether they did it on their own. I do recall they asked for some time after I decided against the first defendant. What role I played in it, if any, I don't recall.

Q Okay. And then showing you a disbursement order that's dated the 29th of August of '79, and it was filed in October of '79 that reflects the settlement. That settlement disbursement order was signed by both you and Judge Nixon.

A Yes. I don't have any independent recollection as to why he signed this one as well. If it was a consent case, which I'm beginning to believe more and more that it was and just no consent was entered in it, this was a period of time in which there were concerns in not only the Fifth Circuit but throughout the circuits in the country as to whether or not magistrates could enter judgments. And I just began as a practice until it was decided by the courts or resolved by Congress through an enactment which gave specific authority for magistrates to try consent cases and enter judgments --

the main thing -- it was not the trial of the case, it was whether or not a magistrate could enter a judgment. I began getting a district judge, not necessarily Judge Nixon, but Judge Russell if the case was assigned to him or Judge Cox if the case was assigned to him, getting their approval on as much as possible. That could be very well the reason I got his approval on this disbursement. I do not recall discussing the settlement with him and in all probability he simply signed it based upon my bringing it in to him and saying this is the settlement of this case that you didn't want to try. But I have no independent recollection of why I did that, but that was probably the reason.

If this was a referral case; that is, a referral for a recommendation, then I would have gotten his approval because I did not have consent to finally resolve the case. So if it fell into the recommendation category, that would be the reason that I got his approval on it, because he would have been the ultimate one to have entered the judgment in the case.

So those would have been the reasons I got his approval; if it were a recommendation case, because he had the authority to enter the final judgment, final approval; if it was a case involving a consent because of the status of the law at that time.

Q Okay, and then I note an order of dismissal with prejudice with regard to the case, as concerned Fairchild Construction Company dated January 30 of 1980, that was again signed both by you and by Judge Nixon.

A That would be based on the same reasons -- same explanation. If it was consent, then I was doing it because of my concern about magistrates entering final orders or final judgments under the law then. If it was a reference, it would be in order to make sure we had the district judge's signature on the document which dismissed the particular party.

Q Judge, I just have a few more questions. If I could ask you about the practice in the District, both your personal experience and what you observed --

A Let me add one thing. In handling this case, I doubt very seriously if after perhaps the pre-trial and the motions that Judge Nixon heard and evidently decided, that he had any connection with the case whatsoever, just based on what I've seen here. It looks like to me that I handled all after the pre-trial and the case was referred to me for whatever reason, I think by consent, that I probably handled it all. I doubt if I even discussed the case with him after that because that was -- normally when a district judge got rid of a case, they never wanted to hear it again. That's not just Judge Nixon, that was Judge Russell and Judge Cox as well. So the approvals there would probably be based upon the fact that I had been employed by him for almost nine years.

ten years at the time, and he had confidence that I wasn't going to put anything in front of him that wasn't what he should sign.

And if it was a consent case, as I said, it was simply to overcome the concern about magistrates not being authorized to enter judgments which were -- which was at least a prevailing opinion by some circuit court judges at the time.

I did want to add that and I guess we can move on.

Q So I gather the bottom line here is that in your recollection and based upon a review of the record here, that after some preliminary pre-trial motions that were dealt with by Judge Nixon, that you took up the case for one reason or another.

A After that June where it says referred to Judge Roper, I would think at that point in time he had probably no dealings with the parties, no dealings with the attorneys and no dealings with the case other than something I may have brought in for him to sign to make sure that we had a district judge's signature on an order of dismissal or on a judgment -- that would be my thought, for the reasons I've indicated; in order to make sure it was a valid judgment in case anything ever came up about it on appeal.

Q Okay, and that would be based -- just to clarify -- as well in part if it were a recommendation case, the fact that he had dealt with you for a number of years and --

A Oh, yeah --

Q -- and you resolved the case essentially.

A That's correct.

Q Okay, let's --

MS. NAUGHTON: Could I ask something?

MR. KEITH: Sure.

BY MS. NAUGHTON:

Q What I'm not clear on is did Judge Nixon sign the ruling on the summary judgment motion?

A I don't know. I assume he did.

MR. KEITH: On some of them, yes.

BY MS. NAUGHTON:

Q Was that before it was assigned to you?

A He should have, before it was assigned to me, he should have handled all the dispositive motions. I noted a Deputy Clerk sheet indicating he actually heard a dispositive motion and decided it, but that was before the pre-trial in June of '79. Up until that time, he should have heard all the dispositive motions and decided them.

Q Okay, and a motion for summary judgment, for the record, is a dispositive motion;.

A Yes; motion for summary judgment, motion to dismiss -- that would be about it. Actually on a settlement, it was not even necessary for his signature but I was perhaps being overly careful if it was a consent case, since it was kind of an involuntary dismissal of the case. It was probably me being overly cautious because I did not want to go through all of this and then have the case come back because it had a magistrate's signature as opposed to a district judge. Thank goodness, Congress remedied that situation by an Act authorizing us to do it, but at that time it was not specifically authorized for magistrates to enter judgments.

BY MR. KEITH:

Q And that was a concern that the judges had as well?

A Oh, yes, because we had gotten a case back, gone through a whole case and then gotten it back because of that reason. There had not been a formal consent in that particular case. It was a nationwide concern, not just this district. That was one of the things the precipitated the Judicial Conference seeking action ultimately getting Congressional approval of an Act which specifically set forth exactly how you go through consents, exactly what the magistrate can or can't do in regards to trial of cases and entering judgments. Those were some of the things that brought about that particular Act.

Q That comment leads me to questioning a little bit more about that last order of dismissal, which is dated January 30 of 1980.

A I don't know when the Act went into effect. It could be that since this case was still -- it was resolved at a time that it was still in question, that we continued the practice in this particular case. That would be my thought on it. Since we began signing them jointly in '79 before the Act went into place, that we continued that just to finally close out the case.

Q And the other possibility would be that for one reason or another Judge Nixon still had some supervisory authority over the case.

A If it was a referral, he would have at least de novo supervisory authority to hear it, but as I say, it is my -- belief -- and I don't have any independent recollection of the case other than what I've said -- it's my belief that he probably had absolutely nothing to do with the case except for me to walk in and say this gets rid of this case, this is another case to finally resolve the case that you referred to me, and he simply signed it based upon my representation to him that we needed that approval either for the fact that it was a consent case which began at least while the law was uncertain or it was a referral case for a recommendation which he still had some supervisory power. But he did not really exercise that much supervisory power regardless of whether it was consent or referral. By that time, as I said, I had worked with him for ten years and he pretty much had confidence in what I was doing.

Q Okay.

A If he didn't I guess he would have discharged me.

Q I have just a few more questions for you, Judge.

A All right.

Q With regard to the problem of recusal in cases that's in practice here in the Southern District, what can you tell us about that? At what stage in the proceeding is that usually handled --

A Once you're aware that there's a conflict, you need to take some action, either bring the attorneys in and discuss the conflict with them and see — if it's a discretionary type recusal, some are discretionary and some are not. Or you need to certainly bring it to the attention of the parties if you're going to exercise your discretion to keep the case. Even if you're going to recuse yourself, it's the usual practice to discuss it with the attorneys. And it's supposedly done by contacting the chief judge at the time -- up until I think around '82 or '83, whenever Judge Russell took senior status, Judge Russell would have been the chief judge, so they contacted Judge Russell and Judge Russell would have assigned another judge to the case.

As we talked about earlier though, there was only one other judge to whom the case could be referred besides the chief judge himself, so it perhaps was done somewhat less formally. The judges divided the cases among themselves throughout the whole district and that meant they were together on the coast at times, they would have lunch together, it could be done over the table or it could be that one judge had a recusal case -- two judges had it and they just swapped and told the chief judge they were swapping. It was just handled by the Clerk's Office by a shifting of letter designations at the end of it. There was no formal procedure but the chief judge would normally be the one who decided who would get the case, either he was going to take it or he would give it to the other judge.

Q Do you recall any cases in which Judge Nixon recused himself, either cases that you ultimately handled or cases assigned to the other judge?

A The two that came to my mind when we were discussing it earlier, I recall there was a case involving Horn Island, which there was a number of Biloxi residents and Gulfport residents who had purchased property out there. It was not a condemnation case as such because the United States contended that there never was any title passed to the State of Mississippi and therefore the State of Mississippi had no authority to give valid titles to individuals. So as I recall it, the district judges felt they should recuse themselves in that case and ultimately it obtained the services of Judge Clark, Charles Clark, Chief Judge, to try the case. I was preparing the case for trial, Judge Clark ultimately assigned it to me, I obtained consent of all 400 parties involved, which was a task in and of itself. We began trial of the case and settled it after a week of trial or two or three days of trial.

Q And the reason for Judge Nixon and the other judges recusing --

A They knew a number of the landowners, as I understood it.

I believe Judge Nixon also recused himself in perhaps one or both of the cases involving Bankamericard and Mastercard because it was ultimately determined that he was a member of the class in one or both of those cases. I'm also a member of the class, one of the few cases I've ever recused myself from. I too had a VISA card during the time in question. I've never recovered anything on it, I might add, but --

MR. KEITH: I think that's all I have, Judge. Do you have anything, Pam?

BY MS. NAUGHTON:

Q One of the issues in the trial was the Judge's whereabouts on May 14 of 1982.

A Yes.

Q Did he ask you or anybody representing him ask you to try to recreate that date?

A Oh, yes, that's why I testified. He was attempting to recollect in his own mind where he was on a date two or three years earlier, and we were aware from court records that he and I had been together in an asbestos hearing that morning. We were beginning a trial of the first asbestos case in this district, which he and I sat jointly on because I had handled all the discovery. It was a case that was going to set the precedent for all 700 asbestos cases that were pending at that time, and all rulings in that case applied to all remaining 700 cases, that's the importance of the case.

The court record showed that we were together that morning. From the records it would show that I was supervising the deposition of one of the experts that afternoon. But I had no independent recollection of whether he and I got together that afternoon or we talked about the case or I saw him at all. But he did attempt to find something that would show we were together or whether or not -- something that might refresh my memory or somebody else's memory, the staff's memory or secretary's memory or his own memory as to where he was that afternoon.

I'm aware after the trial, after everybody said I don't remember precisely, that there was a dental record that the government had which indicated he had a dental appointment up there that afternoon.

Q I take it you don't recall then him telling you that day he anticipated going to the dentist in the afternoon.

A No. I don't even recall the day. I recall the asbestos trial, I recall vaguely going in and out and trying to resolve disputes with lawyers in a deposition. I don't even recall the morning that well so I certainly don't recall him saying he was going to the dentist and I don't recall him -- whether I saw him or not that day.

And that's basically what I testified to at trial, that I didn't recall that afternoon -- and still don't.

Q Did Judge Nixon or his counsel indicate to you he was sure he hadn't been in Hattiesburg that day, or did you get --

A I got the impression that his best recollection, he thought that he was probably there working on getting ready for probably the most -- the biggest trial of the year, but I don't know that I got the impression that he was absolutely positive. But to his best recollection, I think he thought he was probably there getting ready for the trial. He never mentioned at all anything about recalling anything about the dentist. I think he was as shocked as anybody else when that was ultimately found out.

Q I have another question. In terms of your regular procedure on civil cases at that time, the time we're talking now, let's say early '80's, were there several cases that Judge Nixon would just handle himself all the way through?

A With respect --

Q All the way, from discovery --

A No.

Q You would always handle the discovery?

A Magistrates would always handle discovery. Beginning in '76, there was another magistrate in Jackson, so we divided up the workload, he took Jackson and Vicksburg and I took Meridian and Hattiesburg and down here and then we got a third magistrate and he kind of moves back and forth. But magistrates have always handled discovery.

Now that doesn't mean that a district judge is not going to sign a discovery order, you'll find that. They'll either send it to them and they'll sign it if it's not objected to, as part of a pre-trial they may decide they're going to have more time or a scheduling order -- maybe they'll sign off on a scheduling order. It's discouraged but it does happen.

But as far as 90% of the handling -- 99% of the handling of discovery in non-dispositive matters will be done by the magistrates.

Q After discovery is complete, is it unusual for the district judge to continue -- to then take the case all to themselves?

A I don't -- I'm afraid I don't follow you. Take it for trial?

Q Yeah. After discovery, would it be unusual -- what I'm trying to get a fix on is -- let's say an average personal injury type case --

A Yes.

Q Would it be unusual for the judge to take over that case himself through -- after discovery, through dispositive motions and --

A No, that would be normal. He would handle dispositive motions right on up through trial and he would hear in limine motions not considered -- they're normally heard by the trial judge in the case. It would only be when the matter is referred to a magistrate that you would have the district judge perhaps back off a little bit.

Q Okay, so absent consent and absent referral, the judge would take it for himself.

A Oh yeah.

MR. KEITH: And personal injury cases, you know, either diversity of Jones Act, would be cases that the federal judges would normally handle themselves.

THE WITNESS: Yes. Now one thing that you may run into and that is we had joint calendars. This was a special setting, this case we've been discussing, but many times the magistrate would sit with the judge during the trial calendar and the judge may have heard everything up until 30 minutes or an hour before trial and because he can't finish a case or can't get to that case, the parties say we've got our witnesses here, we want a trial, we'll consent to the magistrate, and he takes that case. So you've got the possibility of a consent coming right at the hour before trial, 30 minutes before trial. And that happened a lot.

BY MS. NAUGHTON:

Q So you literally would sit with him while the calendar is being called?

A No, as another judge while the calendar is in progress. It has been the practice and it has worked very well because we've got such a good disposition rate, of there being a magistrate available -- and we still use that practice -- available with the district judge during a calendar. We'll call the docket, some cases will have already entered consents, they will have done it in pre-trial or perhaps when the case was filed, so you know which cases those are. The magistrate will begin trying cases in which there has already been entered a consent, and he'll begin other cases, and as the cases fall away, then the magistrate may pick up other cases simply because the parties want a trial during that particular time.

Q I see.

A When I say sit with him, not on the bench with him, but sit at the same time as a part of his calendar, and we'll move to another district judge and sit as part of his calendar. But particularly Judge Russell and Judge Cox and

Judge Nixon, they almost always when they were here in Biloxi, I would be with them; that is, I would be there available to try those cases which the lawyers consented for me to try.

Q I'm still a little bit unclear. Would it be possible for Judge Nixon to have taken any civil case that you didn't know about? In other words, had not worked on -- let's say personal injury or Jones cases?

A Not unless there had been no discovery problems, and there had never been a motion before me, which is possible I guess, but not likely. Lawyers usually disagree on something. It wouldn't be possible now because you have to have a scheduling order based upon rule changes, but that has been since then. So magistrates become involved in every case now because we have to enter the scheduling order in the case to determine the amount of discovery. There were not scheduling orders then.

So I guess that's a possible, but highly unlikely. As I said, Judge Nixon did like to pre-try his own cases on occasion. Sometimes we'd have joint pre-trial calendars. In other words, I would pre-trial one and he would pre-trial one, so that may have been what happened here. He may have pre-tried that one and I would pre-try another one.

Q Off the top of your head, given your familiarity with the civil calendar, can you think of any other cases where either Wiley Fairchild or the W.R. Fairchild

Construction Company was a party in a case before Judge Nixon? And I realize it's off the top of your head.

A Yeah. I cannot think of any Fairchild cases. There was a Fairchild case about some bumpers one time back when I was a law clerk, but I'm not sure it was this Fairchild.

But the name Wiley Fairchild was simply not one that was familiar to me until all this began. Maybe it should have been --

Q He's a fairly litigious person.

A Yeah. But as I said, the only other Fairchild I recall involved some bumpers years -- I'm really reaching back, 20 years almost, and I don't event remember -- it involved the chrome that came off some bumpers and I don't remember anything about it, but I do not recall knowing about Wiley Fairchild or anything about him until all this occurred. And I simply did not recall he was a part of this case we've been discussing until you brought it to my attention today. It was never discussed with me by anyone.

Q Let me ask you this general question in terms of the investigation that the Department of Justice did and eventual trial and so forth.

A Yes.

Q Was -- did you feel that there was anything untoward done by either the FBI, the Department of Justice or counsel for Nixon in terms of your testimony and your participation in a trial that should come to the attention of the Committee, that you feel strongly about.

A As far as me personally, no, I didn't feel that way I was not involved with it except for this date in May, the fact that I was with him that morning and it was a case on which we had been working for a considerable period of time together and tried for the next -- beginning that Monday for think three solid weeks. But I did not find that --

Q Did you find pressure from either side to try to ge you to say --

A No, not really. It was, you know, certainly disturbing that I went up there and had to testify that I don't know -- the government had the date, but I'll take them at their word they didn't know it.

Q I think they probably would have used it.

A It sure would have saved a lot of time.

Q Is there anything else in terms of the investigation or in terms of the question that's posed to Congress now, which is Judge Nixon's fitness to remain on the bench, that you think would be of importance to our Committee in taking back to Washington?

A Well as I said, I know nothing about the facts of the case except what you already know, that is what came out at trial and has come out since trial, but it would seem to me that the trial was conducted in an atmosphere of tremendous sensationalism. There was unbelievable coverage almost every night and I at the time had a great deal of doubt as to whether or not a federal judge, regardless of the publicity, could get a fair trial by a jury. I don't mean that a jury didn't attempt to be fair, I think they did, but I think -- so many times I worry -- I've tried so many jury cases and I worry about the jurors who say nothing, they're holding something back. Since there was so much publicity, so much sensationalism regarding this trial, I'm concerned that some of the jurors may well have decided the case long before it began in their own minds, and perhaps even unconsciously. That's because of my own experience with jurors when there's a great deal of publicity about certain cases.

But Judge Nixon certainly was convinced, because he had given so many years to the judicial system and because he was a native of the area, that he wanted to be tried by a jury. I'm not sure -- and I don't think he probably was tried by his peers -- I'm not sure a federal judge can be tried by his peers. I guess that's the concern I had as to a judge who had made some extremely unpopular decisions at one time or another regarding school cases which I was a part of, regarding other voting rights cases. So I have concern as to whether or not the jury itself, perhaps even unconsciously, was perhaps prejudiced against him.

I have concern about the trial judge, I understand he's deceased now, but at least the part of the trial I saw, he seemed to not be that aware sometimes of everything that was happening. I know he was elderly, I know he was on dialysis. I did not see all the trial, but after I testified I did see some of it and it concerned me as to the trial judge's reaction to questions and reaction to objections.

I was concerned about the fact that the actual conviction took place on two perjury counts. It seemed to me at least, and this is just my own personal opinion, that Judge Nixon was convicted more on what he did not say perhaps as opposed to what he did say. Maybe in retrospect I'm sure he wishes he had said everything about the conversation, whether he considered it a discussion or not -- and we won't get into that -- whether he -- I think in his own mind he did not feel he had committed perjury before the grand jury, but at the same time it concerned me that he would be cleared on gratuity charge, be cleared on one of the perjury charges and then be convicted on a perjury charge on something that was not a crime as such, at least he was not convicted of that crime. That has been something that has always worried me.

I've been concerned also about the fact that on appeal the entire Fifth Circuit save two new members recused themselves, so he was limited -- it wasn't a draw of judges, he had two relatively new judges and one judge from another district. I don't think he even got a hearing en banc, you've got 15 judges or so and they all recused themselves again. So it bothers me about the appeal process, as to whether or not as a normal citizen you would certainly -- not being a judge who knew all the Fifth Circuit judges and knew them sell, that he would have had a much, I guess possibility of having a more impartial review and not narrowed it down to those who actually decided it on appeal.

So -- and I guess it bothers me too that all the other principals including the son who was alleged -- I assume he's guilty since he's pled guilty -- of smuggling operations, have not been punished that much. Fairchild I think spent six months in a halfway house or even less time, I'm not sure, because of a foul up in the sentencing. Bud Holmes didn't spend any time and some of the other individuals, at least I'm told, were not prosecuted for cooperation. I have no personal knowledge of that.

It bothers me that Judge Nixon, who seemed at least peripherally involved in the whole Fairchild case and how it got from state court -- from federal court to state court, he was not involved in that at all, but one conversation one night when he and the attorney had been drinking and he freely admits that, that he would be the one who has now suffered not only a total loss of reputation of an extremely good jurist, excellent jurist, one of the very best, and also to be incarcerated for several years.

So I guess trying to put aside my friendship for him, respect for him as both a judge and a man, I kind of believe he's been punished enough. And then to be impeached now, which after 20 years of service and at age 60, there is no retirement, nothing, he's been disbarred, so there's no practice of law as such that's on the horizon. I think maybe it's perhaps kicking a man when he's down too much. And I'm not sure that he's -- I know in his own mind he feels he's not guilty of perjury, he didn't feel like he in any way perjured himself. It seems awfully difficult to find a man guilty of perjury on a statement that -- one of the statements that he tried to write himself.

That's just personal observations. It's not based on my knowledge of anything that happened except what I've seen and what I've read since then. But I have problems with now having him to go through an impeachment and be impeached, tried by the Senate and disgraced further, cut off from any future benefits as far as any retirement. If it was -- I think Congress is about ready to pass a Rule 20, but they may not. I think Judge Nixon is 60 now. It troubles me that someone who gave up a practice of law which as I understand -- I was not here at the time -- I understand he was one of the most successful plaintiff lawyers on the coast. He gave that up for a $40,000 salary. I do know he's an extremely dedicated judge, he takes his work very, very seriously. He is one of the very best at dictating opinions into the record, being extremely thorough in what he says.

He's also a very private individual though. I think that's one of the reasons that got him into trouble. He doesn't like to discuss his affairs too much. Perhaps maybe was a little embarrassed about the situation with Mr. Holmes, but I don't think he ever intended to perjure himself in any way, not that he did -- I'm not convinced that he did.

Q When you mentioned the statement that he made in grand jury that he wrote himself. What made you say that he wrote it himself?

A That's my understanding, I don't know.

Q Do you know where you got that understanding, was it your conversations with him?

A I don't recall. I just don't know where I got that understanding. I guess it just sounded like something he might say, I'm sure he played a part in it. I know at the time he had not employed Mike Farrow -- that was later.

Q Right.

A I think he had Bill Goodman at the time. I don't have any personal knowledge whether he wrote it himself or not. But when he began to discuss his mother and what happened to her, that just sounded like something he would say.

Q When -- after the FBI interviewed him the first time in April of '84, did he discuss any of this with you?

A No, he didn't. I wish he had, I would have advised him differently, but he did not. The only thing he discussed with me was there wasn't anything to it, that he had done nothing wrong, he did say that. He didn't see that anything would happen because he hadn't done anything wrong. He's never at any time since it started, as I said I saw him on certainly a weekly basis until he left, felt like he had done anything of a criminal nature. Certainly he has regrets as to how it was handled, what he did and said, he wishes he had -- he could go back and undo the hand that's already written, but none of us can do that.

I do know that he does not feel that he has committed any crime and has maintained that position. But it's difficult for him to understand, and I think the public, a great deal of the public here as well, to understand how a man can be cleared on a charge of gratuity. It seems like maybe that was a problem, the whole trial seemed to be focused on the gratuity and did he get these leases in return for some type of favor and it was decided he didn't. And perhaps too little attention was placed on the perjury. I think it was perhaps felt that if that fell everything else would fall with it. And that was obviously not what happened.

I worry about too a jury getting back and you have no idea what a jury did and we'll never know because the rules don't permit you to ask them, but as to there being some disagreements and the jury feeling like well, he's certainly guilty of some improprieties and we'll just convict him on the perjury charges, the jury not realizing the ramifications of that, that a conviction on perjury to him is just as bad as far as the consequences as a conviction on the principal charge.

I think if -- I did not hear the final arguments, but -- so I don't know what was said by defense counsel, but I'm not sure how much he dwelled on the consequences of if you find him not guilty on the gratuity, you ought to go forward with the perjury -- I don't know, I didn't hear the final argument.

BY MR. KEITH:

Q Did the Judge ever talk with you about the facts of the case, did he talk with you about what happened that night in the phone conversation with Fairchild or talk about his relationship with Holmes at all?

A No, not that much, except to the extent of what he said on the stand. I heard his testimony. That was really the first time I had heard a full account. He didn't talk about it that much other than to say that he was not guilty of it.

It has been extremely hard on him, his family -- I don't know how his wife has survived. She's got five children, two from a prior marriage and five by this marriage, one of his -- of his by this present marriage. She was previously married, so I guess we've got seven children altogether, and it has been very difficult on all the children. Of course I knew the first wife, he was still married to her when I first started working for him. I know Barbara quite well also, and it has just been an extremely trying time for him.

I know he's gotten a lot of support from local lawyers and from friends and I know that has helped him, but it just seems to me that there reaches a point in time when enough is enough. I don't know what Congress is going to do but I would certainly hope they would feel like this man has been punished enough, and can get on back and at least regain some of the reputation that was so excellent.

When I first started, I heard many judges in the area feel like that perhaps he was even a candidate at one time for the Supreme Court and certainly he had the mental capacity to do that. He was offered and turned down a Fifth Circuit judgeship I guess about five years ago. He decided he preferred to stay in the courtroom. When I say offered, I mean offered through the Senator, the Senator was willing to do it, the Senate would have had to confirm, but it's just a tragedy and I am --

I will not repeat my concerns about the entire procedure as far as the trial and what occurred, but I just feel like enough maybe -- he may have been punished enough for what I don't -- I'm not even sure was a crime, it may have been certainly a lack of judgment, certainly a lack of judgment in not saying everything, but I'm not sure that that was a crime.

I'll end with that, that I just feel like he's been punished enough and his family has been punished enough, and maybe the court has been punished enough. We've had not only the absence of a judge which greatly affects the other judges and what they can do and doubles the load and triples the load. There was a year there when there was not anybody but a senior district judge and I was handling practically everything. We have another judge on now so it's better, but it would be a lot better if we had a full complement of judges.

Also the court itself and the reputation of the court itself, I just would like to see it end and let him serve out his time and come on back and retire.

MR. KEITH: I think that's all, Judge, thanks very much for your time.

THE WITNESS: I appreciate you working with me as far as my time schedule. This has been a hectic day. It's not often though that we get a ten most wanted plus everything else.

MS. NAUGHTON: Thank you very much.

(Whereupon, the deposition was concluded at 11:34 a.m.)

CERTIFICATE

I, William L. Warren, Court Reporter, do hereby certify that JOHN MARLIN ROPER, was first duly sworn to testify the whole truth and, upon oral examination, testified as hereinbefore shown on pages 2 through 54 inclusive, and the same was taken by stenomask and accurately reduced to typewriting under my direction.

I further certify that said deposition was taken at the time and place stated herein and, further, that I am neither kin nor counsel to any party in this action and in no wise interested in the outcome of this cause.

WITNESS my hand this 3rd day of January, 1989.

William L. Warren

William L. Warren
Court Reporter

BEFORE THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
U. S. HOUSE OF REPRESENTATIVES

In the Matter of:	)	
	)	
An Impeachment Inquiry concerning U. S. DISTRICT JUDGE WALTER L. NIXON, JR.	)))	H. Resolution 407 (100th Congress, 1988 Session)

The deposition of JOHN MARLIN ROPER, taken by Counsel for the Committee on the Judiciary, by William L. Warren, Court Reporter, was continued in the Grand Jury Room, First Floor, U. S. Federal Courthouse, Biloxi, Mississippi, on the 20th day of December, 1988, commencing at the hour of 4:31 p.m.

oOo

COUNSEL PRESENT:

PAMELA NAUGHTON, Attorney
PETER KEITH, Attorney
Committee on the Judiciary
U. S. House of Representatives
Washington, D. C.

PROCEEDINGS

MR. KEITH: For the record, this is a continuation of our deposition of Magistrate Roper. We appreciate you coming back to talk with us, Judge.

I understand that we've got some additional materials now concerning that Boam case and you've also had the opportunity to review a consent order and reflect a little bit on it.

Whereupon, ---

JOHN MARLIN ROPER

was RECALLED as a witness herein, and having been previously duly sworn, was examined and testified further as follows:

THE WITNESS: Yeah, when we were here yesterday, it was my understanding from you that you could not find an order of reference on the docket sheet, and I took you at your word, you hadn't seen it of course, and I'm sure you didn't. But when I arrived back this morning, I asked my courtroom deputy to see if perhaps in our office we had some record to show whether or not the Boam case was a consent case or not, which my testimony yesterday was in the alternative. If it had been a consent case, one thing and I was having difficulty trying to understand why there had not been a consent order entered in the case or at least an order of reference, making it a recommendation case.

My courtroom deputy, examining the docket sheets, did find that on 7/9/79, there had been an order of reference entered in the case with a stipulation of consent to trial by United States Magistrate, and she pulled that from the order book, and I advised you of that this morning and said I wanted to come back on the record and at least indicate that there was a referral of the case to me for trial on July 9, 1979. And that's signed at least by the attorneys for Boam and attorneys for Dependable Insurance and attorney for Magnolia Construction and attorney for Gulfport, and I assume the other parties were going to consent at time of trial, but I see four signatures.

EXAMINATION

BY MR. KEITH:

Q As I understand it, these were the parties in which trial was actually conducted and --

A I think I only conducted trial for Larry Lenoir, as I told you yesterday, Magnolia Construction. It was bifurcated, so after the first part of the trial, the first day, the others began settlement negotiations after that ruling -- that's what precipitated the settlement of everybody else that was involved in the case.

Q So that ultimately, as I understand it, there would have been no need for a consent order for trial for the other parties because they all settled out.

A Yes. They probably though at the time were ready to -- either had subsequent consent orders or agreed to it on the record. I wouldn't start it unless I had at least known orally that I had the consent of all the parties. These are at least four of the parties who signed this consent order at the time of submitting it to Judge Nixon for his order of reference. Of course he has an order of reference on the bottom of it, that's the way we did it then. It's an order that was referred to me for trial in accordance with stipulation.

This is important because it was something that slipped my mind yesterday. I told you of the concern we had at the time of magistrates not being able to enter final judgments, which were appealable. The Circuit Court had had several rulings which said a magistrate, absent specific statutory authority to enter a judgment, could not do so. To avoid the problems that we'd had, the one case that had come back, and concern about others, another type of order of reference was drawn up which basically says specifically authorize -- let me just read the whole thing for the record -- "The undersigned counsel are fully aware of the right of trial of the captioned proceeding before a district judge in the United States District Court for this District and on behalf of their client, do hereby specifically waive trial before the District Judge and consent to this reference of a trial before a United States Magistrate, and specifically authorize entry of a final decision by the United States Magistrate with a judgment in accordance therewith entered by the District Judge, if appropriate, upon review of the proceedings."

So basically what we had moved to is in any consent case, if the magistrate were trying it before a jury, then he would try the whole case; before the judge himself, he would try the entire case, and render an opinion, but the judgment or an order of dismissal if it was ultimately settled, would be at least entered by the district judge also. And that's why I was having Judge Nixon sign the judgment and I think you'll probably find his signature on the judgment of Magnolia, which is the only part of it I decided from a bench decision at the trial on the I believe 7th of September. And the rest of it was settled after that, so that's why I was obtaining his signature in order to have a final judgment or final order in the case that would be at least one which could be appealed from if anybody so desired.

So that was the reason that I was obtaining his signature, is because in this order of reference, which I've made a copy of for you, that was what I was required to do.

Now the district judge -- and that was, as I said, not just Judge Nixon, but Judge Cox and Judge Russell as well -- may not have -- they would certainly look at what was brought down, but they understood why it was being done, it was simply to make it a final judgment. In all other respects it was a consent case and we had been doing consent cases for three or four years before that, and the only problem was this concern about entry of the final judgment. So they would sign the final judgment, that would make it appealable, and it would prevent having to go through an entire trial and get it on appeal and they not consider it because they said a magistrate could not enter a final judgment and then you've got to come back and have the judge enter the final judgment.

They did not review the proceedings that carefully, they would basically take our word for the fact that there was a trial, there was an opinion, there was a jury verdict, whatever it may be, and sign the judgment.

Q Let me ask you, was that -- I guess there are a couple of ways of looking at that, was that in part out of deference to you in recognition of the quality of work that you had been doing and your experience in these kinds of matters and your wisdom in handling those kinds of cases or was there -- would it also be fair to say that there --

(Brief pause.)

Q Let me rephrase the question a little bit. At this point in time, was there some confusion about whether a district judge had to retain some sort of supervisory authority over a case such as this, and essentially either had to sign off on the papers, and I notice the language in here, "In accordance therewith entered by the District Judge is appropriate, upon review of the proceedings."

A Well certainly he had to make sure that I guess the judgment or the order was in proper form, or looked at it, but as far as reviewing it and making a decision as to whether or not the -- he did not necessarily read an opinion if that was rendered or if a jury verdict, he may have a copy of the verdict itself, so the actual statute as I recall was one which authorized only a district judge to enter judgment in a case, and that was the basis of the Circuit Court's rulings that without specific statutory authority, a magistrate could not enter a final judgment in a case.

That was changed with the '79 Act, which allowed the magistrate to try the case and enter judgment in a case. And so that was the -- this language was one that was devised by us to continue with the consent trials, which is what we wanted to do on a continual basis, but at least have the District Judge to look at it to make sure that the judgment was in I guess appropriate judgment form and the jury verdict was there. He would then sign off on it to make it an appealable judgment. But as I said, certainly by then I had been trying cases for four or five years and had been with him almost ten years, so I'm sure that he had confidence that I had tried the case and was not presenting him with a judgment that I had not determined myself to be proper.

Q And it was your hope that through this form of consent, that there would only be ultimate need for one trial, that the parties would waive their right to protest your presence as a magistrate or protest findings of fact or evidentiary matters?

A -- That's what the parties wanted. Most of the parties did not want -- in a jury trial, there was really no real procedure for review by the district judge, so this was a form that was really more important for a jury trial. The district judge couldn't sit there for the jury trial, there cannot be a reference of a jury trial to a magistrate, it has to be by consent with final judgment. There can't be any really review of a jury trial. In a non-jury, it's a little different, you can get a transcript, you can review a recommendation.

But that's not what occurred here because this was a form used for consent to trial by magistrate with appeal to the Fifth Circuit, as it ultimately became. But after the Fifth Circuit and other circuits began determining that under the statute, and I forget the number of it, magistrates perhaps could not enter final judgments. Everything was find, if you tried the case and entered the judgment and there was no appeal, it didn't make any difference. But if there was an appeal, they would send it back and say the district judge needs to enter the final judgment. So they would enter the final judgment and then the Fifth Circuit would review it on its merits and there was no problem. And we continued with that for several years until the statute was passed and ultimately declared constitutional.

Q To your knowledge, was there ever consideration by the Fifth Circuit or by some other court or appellate in particular, of the question of whether in this kind of -- situation, the district judge had to have some sort of substantive oversight of the case, whether -- the question being whether it was his constitutional responsibility, and statutory responsibility, to oversee the case -- I guess that would be part of the --

A I'm sure that's part of their reading into the statute that only a district judge can enter a judgment in a case. It was kind of an anomaly because you also had -- you seem to have -- magistrates had permission to try cases, there was nothing in the law that prohibited him from trying a case and trying it to conclusion, but the problem came in the entry of judgment phase. And I don't have any doubt that that certainly could have been read into it that he had some supervisory power over it.

But the important thing to me though is what you're looking for here and dealing with, is whether or not in this particular case, Boam Company versus Dependable Insurance, Judge Nixon had any influence or had any decisionmaking power regarding decisionmaking aspects to the case after I began the trial, and began working with the settlements, and my answer to that is he did not because I tried the case and I entered the decision, a judgment was rendered against Magnolia on the basis of that, and I don't recall the exact settlement negotiations, how deeply I became involved or whether I even became involved, but they were ultimately settled and I presented it to him.

I have no independent recollection of it, but that would have been almost every case. He never got involved back in a case once I received it on consent. That was -- nor did any other judge, they were delighted to have the magistrate take the case over.

Q Okay, so leaving aside the legal or constitutional question of what supervisory power the Judge had over the case, if we can turn to the actual chronological date in which -- what you described as the decisionmaking power in the case, took place, the transfer from Judge Nixon to you.

A Yes.

Q With the assistance of the Clerk's Office here, I've been able to pull the other orders in the case that were listed on the docket sheet, and I'm just showing them to you. It looks like orders were entered by Judge Nixon in the case on the 3rd of May, 1979, 8th of June, 1979, 13th of June, another one on the 13th of June, the 19th of June again in 1979, and then as I read the order of reference, that is dated July 2, 1979.

A Filed on July 9, the order of reference would be July 9, the parties signed it on the 2nd of July.

Q Okay. I note that there are orders on summary judgment motion signed by Judge Nixon --

A You showed those to me earlier. I have not looked to see exactly who they are against. My thought would be that those motions had been filed earlier and Judge Nixon, as you will recall from looking at the papers yesterday, had conducted the pretrial in this case. Summary judgment motions had to be filed prior to the pretrial, so I would assume that those were matters he had under advisement at the time of pretrial and proceeded to decide those particular summary judgments, since he already had done work on them, had them under advisement.

Q If you remember yesterday, there was the one entry on the deputy clerk sheet "These motions may be decided by the District Judge."

A Yes, it was probably these motions that were being referred to on that particular deputy clerk sheet after I had a conference in the case.

Q Okay.

A And then after that, you should have a judgment entered against Magnolia signed by both Judge Nixon and myself in accordance with the order of reference, that he had to sign the judgment too.

Q That's right, that's dated September 6.

A That would have been at the time of trial I believe. Let's see when the trial was held. We've got a sheet somewhere that shows it, but that's on the 7th of September, isn't it — a judgment was entered, I believe, since settlement agreements were entered into on that date or maybe thereafter, shortly thereafter.

Q Okay, and I think we went over —

A I think we went over those settlement agreements, but those would have been also signed by he and I. I felt like any final order in the case, either the judgment or the dismissal of claims based upon a settlement, that a case of this magnitude needed to be signed by both of us in light of the reference that I had in the case.

Q Whatever the ultimate legal solution in the question of what your power was vis-a-vis the district judge, if you had both people's signature on it, there would be no appeal issue.

A I tend to be overly cautious. I'm not sure that that was the way to do it, but the district judges to continue trial by magistrates and the only way we saw to do it was to have the district judge at least sign the judgment. And we continued to do it. It did not present as great a problem with non-jury as it did with jury, because there's no way -- the only thing a district judge would have with a jury would be the jury verdict. With a non-jury case, I suppose he could have had a copy of the opinion, but they frankly didn't desire it in a consent case and that's what the parties -- the parties desired direct appeal to the Fifth Circuit from the magistrate's ruling, and they desired to have the district judge to go ahead and enter a judgment so it would be appealable.

Q Okay. Let me ask you just a couple of questions about another case in which you were only briefly involved; that's the case of Seymour --

A Do you want a copy of this consent form?

Q Yes, please. The case of Seymour v. L & A Contracting Company --

A Before we do that, do you have this page of the docket sheet that shows that? I just want to make sure that you've got that. You said yesterday you could not find a letter of reference and I just -- yeah, you've got it.

Q That was an oversight on my part and I'm glad we had a chance to clear that up.

A Yeah, I am too because as I said yesterday, I was trying to testify in the alternative as to if it was a consent case, one way; if it was a reference with a recommendation, something else. And I could not understand, as careful as I am in demand of my staff, why they had not obtained an order of reference in this case and filed it. So I feel better, at least, about the staff I had at that time.

Q Well I'm glad we found it because I had looked -- frankly had been to the Federal Records Center and looked through the pleading file and didn't see one. Then in looking back through the docket sheet, I'm glad that the order books are still here and that you all kept a separate file.

A Yes.

Q -- Getting back to this case of Seymour v. L & A Contracting Company case, do you recall anything about this particular case -- Mr. Seymour, if I can represent to you, was an individual represented by Joe Sam Owen and Bobby O'Barr, an individual who was severely injured when a slab of concrete fell on top of him, he was working under a bridge that was being demolished. Again, your role in this case was very minor, but I do want to ask you if you recall anything about this particular case.

A I don't recall this case at all. I don't recall anything about it. This is 1980, it's been nine years ago, I just do not recall the case. I would have, nine years ago, been handling all of the non-dispositive or discovery motions in the case, so I should have signed most of the orders for time or discovery orders, but I don't recall any dealings with the case from a pretrial basis or otherwise.

Q The only involvement that I've been able to determine that you had in the case was, as you say, some initial very minor orders granting extensions of time very early on in the case, which I gather would have been your traditional role in taking care of non-dispositive pretrial matters in civil cases.

A Yes. That's all I see on the docket sheet, is some early on -- some motions, perhaps uncontested motions, handled early on. One for enlargement of time.

Q Right, and I have the orders. The Clerk's Office has been most cooperative in pulling from the order books, the orders in the cases.

A I'm glad we made the determination yesterday these orders were available. All of these look like they would have been uncontested motions. I see the attorneys have even signed off on two of them, approval, so this would not have even necessitated a hearing, this would have been something that just came across my desk for signature.

Q Okay, and let me ask you -- I know you told us yesterday that you had no knowledge up until the time of the publicity associated with Judge Nixon's investigation and indictment, of his financial relationship with Mr. Fairchild and his construction company --

A That's correct.

Q -- but let me ask you again in the context of this Seymour case, do you recall that issue ever coming up, Judge Nixon ever making note of a financial relationship with Mr. Fairchild or his construction company or recusal because of that ever becoming an issue.

A I don't recall anything about the Seymour case, it's a new case to me, I don't know anything about it.

MR. KEITH: Okay, fine. Judge, we greatly appreciate you taking the time to reflect upon our discussion yesterday and to look back over the file.

THE WITNESS: Well fine. I appreciate you letting me come back in because I was concerned about it last night, as to why I had proceeded with a case in which the record showed no written consent and no order of reference because that was not the normal practice at all, and I found it difficult to believe this would have been the one case in which I did not have a consent or an order of reference. So I'm glad we were able to find it. It would have been very unusual for me to proceed without it. And as I said yesterday, sometimes they did come in at the very last minute and even at the time of trial, consents were being filed, and order of references, because of our manner of proceeding, but almost always, hopefully a consent was entered or an order of reference was entered in the case. So I'm glad to find out it occurred in this case as well.

MR. KEITH: All right, then.

(Whereupon, the deposition was concluded at 4:58 p.m.)

CERTIFICATE

I, William L. Warren, Court Reporter, do hereby certify that JOHN MARLIN ROPER, was previously duly sworn to testify the whole truth and, upon oral examination, testified as hereinbefore shown on pages 67 through 72 inclusive, and the same was taken by stenomask and accurately reduced to typewriting under my direction.

I further certify that said deposition was taken at the time and place stated herein and, further, that I am neither kin nor counsel to any part in this action and in no wise interested in the outcome of this cause.

WITNESS my hand this 6th day of January, 1989.

William L. Warren

William L. Warren
Court Reporter

United States Magistrate
Southern District of Mississippi
Biloxi, Mississippi 39533

John M. Roper
United States Magistrate

P. O. Drawer 1164
601 - 432 - 8612

February 10, 1989

Mr. Peter E. Keith
Associate Special Counsel
Committee on the Judiciary
U. S. House of Representatives
Washington, D. C. 20515-6216

Dear Mr. Keith:

I am enclosing my proposed corrections to the transcript of my deposition.

Sincerely,

John M. Roper

JMR:js

enclosure

CHANGES TO DEPOSITION OF JOHN M. ROPER

Page 3	Line 23	"Dan" instead of "Van"
Page 5	Line 20	"liked" instead of "like"
Page 7	Line 15	"which" between "form" and "is"
Page 10	Line 15	"you" instead of "he"
Page 11	Line 5	omit "a consent --"
Page 11	Line 19	omit "As well as" and "they". Sentence should read "Dispositive motions were also"
Page 11	Line 21	omit first "if" and insert "if there was testimony" between "required" and "or"
Page 21	Line 9	"many" instead of "all"
Page 32	Line 14	"that" instead of "the" between the words "things" and "precipitated"
Page 32	Line 15	insert "and" between "action" and "ultimately"
Page 33	Line 15	"judgment" instead of "case" between "another" and "to"
Page 35	Line 3	"talked about" instead of "had"
Page 43	Line 12	"even" instead of "event"
Page 46	Line 18	"regarding" instead of "on"
Page 47	Line 4	"well" instead of "sell"
Page 47	Line 5	"greater" instead of "a much, I guess"
Page 47	Line 12	period after "sure"
Page 47	Line 13	New sentence beginning with "Because" with comma between "sentencing" and "Bud"
Page 48	Line 19	"80" intead of "20"
Page 50	Line 17	Add "accepting a" between "of" and "gratuity"

Page 50	Line 17	add after "gratuity" "and convicted of the crime of perjury regarding that charge"
Page 51	Line 12	add "a not guilty finding regarding" between "with" and "the"
Page 51	Line 25	"He's" instead of "She's"
Page 52	Line 8	"them" instead of "him"
Page 52	Line 24	omit "and I am"
Page 53	Line 2	omit "enough maybe -- "
Page 53	Line 3	omit "I don't -- "
Page 53	Line 11	omit "and triples the"
Page 53	Line 12	omit "load."
Page 53	Line 13	"myself" instead of "I was"
Page 53	Line 19	add "when eligible" at end of sentence.
Page 57	Line 13	"yes" instead of "yeah"
Page 60	Line 16	"by" instead of "from"
Page 61	Line 9	add "back" after "it"
Page 62	Line 9	add "he approved." after first "not" and omit "the --" ; begin new sentence with "He"
Page 62	Line 10	add "review" between "or" and "if"; add "although" between "verdict" and "he"
Page 62	Line 11	"The" instead of ", so the"
Page 63	Line 20	"This began" instead of "But"
Page 63	Line 23	"fine" instead of "find"
Page 67	Line 14	"Judge Nixon and myself" instead of "he and I"
Page 67	Line 24	add "desired" between "judges" and "to"
Page 68	Line 7	add "wanted." after "parties" and capitalize "The"

Page 68	Line 20	"an" instead of "a"
Page 68	Line 21	"order" instead of "letter" "yes" instead of "yeah"
Page 68	Line 24	"Yes" instead of "yeah"
Page 69	Line 3	"and demanding" instead of "in demand"

EXHIBIT 20

(Rev. 10/80)

MONTHLY REPORT OF CIVIL CASES BY THE CLERK OF COURT #0538

UNITED STATES DISTRICT COURT FOR
SOUTHERN DISTRICT OF MISSISSIPPI

PART I: **MOVEMENT OF CIVIL CASES FOR THE MONTH OF** NOVEMBER 19 82

SEE INSTRUCTIONS ON THE REVERSE SIDE

1. Cases pending at the close of preceding month.	2622
2. Cases filed during this month exclusive multidistrict litigation cases.	146
3. Multidistrict litigation cases received this month.	0
4. Total cases filed during this month.	146
5. Cases terminated during this month exclusive of multidistrict litigation cases.	127
6. Multidistrict litigation cases transferred out or terminated this month.	1
7. Total cases terminated this month.	128
8. Cases pending at close of this month.	2640

OTHER ACTIONS

9. Number of additional JS-6 forms in multiple party cases. ▶ 0

10. Number of within-district transfers listed on reverse side of this sheet. ▶ 0

PART II

NUMBER OF CIVIL CASES ASSIGNED TO INDIVIDUAL JUDGES/MAGISTRATES DURING MONTH AND THE TOTAL NUMBERS PENDING AT END OF MONTH

JUDGE/MAGISTRATE Ⓐ	NUMBER OF CASES ASSIGNED DURING MONTH Ⓑ	NUMBER OF CASES PENDING AT END OF MONTH Ⓒ	JUDGE/MAGISTRATE Ⓐ	NUMBER OF CASES ASSIGNED DURING MONTH Ⓑ	NUMBER OF CASES PENDING AT END OF MONTH Ⓒ
Harold Cox (3802)	53	613			
Dan M.Russell,Jr.(3803)	44	1030			
Walter L.Nixon,Jr.(3804)	49	997			

NOTE: Column "C" of the current report should be equal to the total of Column "C" from the previous report *plus* the number of new assignments (Column B of current report) *less* the number terminated or transferred to other judges during the current month.

Total civil cases for which final proceedings are still pending as of the end of month.

ASSIGNED	2640
UNASSIGNED	0
TOTAL PENDING	2640

PART II

NUMBER OF CRIMINAL DEFENDANTS ASSIGNED TO INDIVIDUAL JUDGES OR MAGISTRATES DURING PERIOD AND THE TOTAL NUMBERS PENDING AT END OF PERIOD

JUDGE OR MAGISTRATE Name Stat. No. (A)	NUMBER OF DEFENDANTS Assigned During Period (B)	Pending at End of Period (C)	JUDGE OR MAGISTRATE Name Stat. No. (A)	NUMBER OF DEFENDANTS Assigned During Period (B)	Pending at End of Period (C)
Harold Cox (3802)	0	46			
Dan M.Russell,Jr.(3803)	0	60			
Walter L.Nixon,Jr.(3804)	0	41			

Total criminal defendants for whom final proceedings were still pending as of end of period.

ASSIGNED	147
UNASSIGNED	0
TOTAL	147

NOTE: Column "C" of the current report should be equal to the total of Column "C" from the previous report *plus* the number of new assignments (Column B of current report) *less* the number terminated or transferred to other judges during the current period.

Comment:

This report is to be mailed to: STATISTICAL ANALYSIS AND REPORTS DIVISION
ADMINISTRATIVE OFFICE OF THE U.S. COURTS
WASHINGTON, D.C. 20544

cc: Circuit Executive

Attn: Criminal Branch

Submit only one report covering all divisions within your district, accompanied by all report forms JS 2 and 3.

I. Henley, Deputy Clerk
Person submitting report

Phone # FTS 490-4439

MANAGEMENT STATISTICS

FOR UNITED STATES COURTS

1980

A REPORT

- To the Chief Justice of the United States
- To the Chairmen and Members of the Judicial Councils of the Circuits
- To the Chief Judges and Judges of the United States Courts

FROM

- The Director of the Administrative Office of the United States Courts

MISSISSIPPI SOUTHERN

U.S. DISTRICT COURT
JUDICIAL WORKLOAD PROFILE

			TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING AMONG 95 DISTRICTS
			1980	1979	1978	1977	1976	1975	
OVERALL WORKLOAD STATISTICS	Filings*		1,815	1,601	1,398	1,289	1,144	1,007	
	Terminations		1,513	1,503	1,138	1,088	1,059	850	
	Pending		1,841	1,543	1,445	1,185	984	899	
	Percent Change in Total Filings Current Year	Over Last Year ▶		13.4					26
		Over Earlier Years ▶			29.8	40.8	58.7	80.2	6
	Number of Judgeships		3	3	3	3	3	3	
	Vacant Judgeship Months		.0	.0	.0	.0	.0	.0	
ACTIONS PER JUDGESHIP	FILINGS	Total	605	534	466	430	381	336	1
		Civil	588	518	428	379	346	296	1
		Criminal	17	16	38	51	35	40	90
	Pending Cases		614	514	482	395	328	300	10
	Weighted Filings**		652	547	506	449	417	370	1
	Terminations		504	501	379	363	353	283	5
	Trials Completed		47	53	48	43	53	57	26
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	4.0	6.9	3.8	3.3	3.0	3.6	56
		Civil	9	8	9	8	9	8	47
	From Issue to Trial (Civil Only)		10	13	12	13	10	11	9
OTHER	Number (and %) of Civil Cases Over 3 Years Old		88 (4.9)	61 (4.1)	46 (3.3)	28 (2.5)	17 (1.8)	23 (2.7)	
	Triable Defendants** in Pending Criminal Cases Number (and %)		11 (16.9)	13 (29.5)	26 (41.9)	34 (50.0)	23 (39.7)	3 (33.3)	
	Juror Usage Index		24.95	25.39	21.92	22.82	24.97	22.42	89
	% of Jurors Not Serving		46.8	44.9	39.0	41.1	46.3	41.9	79

FOR NATIONAL PROFILE AND EXPLANATION OF NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW—OPEN FOLDOUT AT BACK COVER

1980 CIVIL AND CRIMINAL FILINGS BY NATURE OF SUIT AND OFFENSE

Type of Case	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	1,763	66	172	40	15	41	37	391	820	9	127	4	41
Criminal*	50	–	4	1	2	–	11	3	1	8	13	3	4

*Filings in the "Overall Workload Statistics" section include criminal transfers, while filings "by nature of offense" do not.

**See Page 129.

COMPARISON OF DISTRICTS WITHIN THE CIRCUIT — YEAR ENDED JUNE 30, 1980

			CT	NY,N.	NY,E.	NY,S.	NY,W.	VT
OVERALL WORKLOAD STATISTICS	Filings		1,978	1,067	3,904	8,307	1,207	425
	Terminations		1,662	741	3,796	7,937	1,228	315
	Pending		3,121	1,533	4,465	8,960	1,359	472
	Percent Change in Total Filings Current Year	Over Last Year	-.1	15.2	5.6	6.0	-3.9	27.2
		Over 1975	27.9	46.4	35.9	9.1	46.3	8.1
	Number of Judgeships		5	3	10	27	3	2
	Vacant Judgeship Months		6.8	4.5	14.0	12.0	.0	.0
ACTIONS PER JUDGESHIP	FILINGS	Total	396	356	390	308	402	213
		Civil	371	329	350	279	356	193
		Criminal	25	27	40	29	46	20
	Pending Cases		624	511	447	332	453	236
	Weighted Filings		421	332	385	345	343	225
	Terminations		332	247	380	294	409	158
	Trials Completed		44	24	47	31	54	28
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	5.3	3.6	5.3	4.2	6.2	4.6
		Civil	14	13	9	9	8	10
	From Issue to Trial (Civil Only)		23	20	18	13	23	-
OTHER	Number (and %) of Civil Cases Over 3 Years Old		455 (15.1)	170 (11.7)	394 (10.2)	774 (9.3)	164 (13.1)	5 (1.3)
	Triable Defendants in Pending Criminal Cases Number (and %)		52 (26.3)	8 (8.7)	187 (15.3)	411 (44.7)	8 (5.1)	13 (14.1)
	Juror Usage Index		15.11	18.96	21.36	23.43	20.12	14.92
	% of Jurors Not Serving		22.1	37.0	46.0	50.8	30.0	29.2

COMPARISON OF DISTRICTS WITHIN THE CIRCUIT — YEAR ENDED JUNE 30, 1980

			AL.N.	AL.M.	AL.S.	FL.N.	FL.M.	FL.S.	GA.N.	GA.M.	GA.S.	LA.E.
OVERALL WORKLOAD STATISTICS	Filings		2,206	1,017	859	792	3,948	6,501	3,143	958	993	5,717
	Terminations		1,994	816	759	755	3,566	6,919	3,134	865	1,057	5,830
	Pending		1,684	684	641	554	4,108	10,479	3,000	691	918	6,510
	Percent Change in Total Filings Current Year	Over Last Year	9.3	-7.7	1.2	-16.2	7.2	-12.9	2.9	6.3	-12.3	15.4
		Over 1975	5.1	10.4	11.6	7.0	38.7	76.0	-6.6	24.1	-22.4	25.6
	Number of Judgeships		7	3	2	3	9	12	11	2	3	13
	Vacant Judgeship Months		34.8	21.4	.0	3.4	4.1	18.8	16.5	.0	5.2	14.4
ACTIONS PER JUDGESHIP	FILINGS	Total	315	339	430	264	439	542	286	479	331	440
		Civil	277	293	397	235	402	491	259	439	300	419
		Criminal	38	46	33	29	37	51	27	40	31	21
	Pending Cases		241	228	321	185	456	873	273	346	306	501
	Weighted Filings		298	307	412	213	316	410	292	444	315	388
	Terminations		285	272	380	252	396	577	285	433	352	448
	Trials Completed		39	28	53	41	34	42	33	54	57	40
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	2.0	2.1	3.4	3.7	4.3	5.0	3.9	4.2	3.3	3.4
		Civil	7	4	7	6	8	6	10	6	9	13
	From Issue to Trial (Civil Only)		11	6	9	16	19	11	19	10	13	20
OTHER	Number (and %) of Civil Cases Over 3 Years Old		62 (4.0)	17 (2.9)	24 (3.9)	17 (3.4)	349 (8.9)	242 (7.6)	173 (6.1)	16 (2.5)	59 (6.7)	472 (7.4)
	Triable Defendants in Pending Criminal Cases Number (and %)		39 (37.9)	22 (50.0)	34 (66.7)	18 (20.7)	85 (29.8)	942 (58.4)	56 (19.9)	6 (19.4)	13 (36.1)	81 (39.7)
	Juror Usage Index		21.07	20.57	19.16	18.84	16.70	23.19	18.01	20.19	18.47	18.38
	% of Jurors Not Serving		40.7	27.7	23.8	42.5	31.8	47.3	39.0	33.8	30.3	48.9

COMPARISON OF DISTRICTS WITHIN THE CIRCUIT— YEAR ENDED JUNE 30, 1980

			LA.M.	LA.W.	MS.N.	MS.S.	TX.N.	TX.E.	TX.S.	TX.W.	CZ
OVERALL WORKLOAD STATISTICS	Filings		656	2,057	947	1,815	2,914	1,932	4,844	2,030	350
	Terminations		494	1,841	966	1,513	2,987	1,574	4,404	1,772	776
	Pending		893	2,185	819	1,841	3,533	2,602	6,066	2,184	292
	Percent Change in Total Filings Current Year	Over Last Year	4.0	5.8	-.5	13.4	-3.7	15.3	.5	2.1	-53.5
		Over 1975	35.3	24.1	30.6	80.2	-2.5	53.9	29.1	-7.7	-64.1
	Number of Judgeships		2	5	2	3	9	4	13	6	1
	Vacant Judgeship Months		11.0	3.0	6.7	.0	5.5	.0	14.8	29.3	.0
ACTIONS PER JUDGESHIP	FILINGS	Total	328	411	474	605	324	483	373	338	350
		Civil	311	387	455	588	281	452	287	263	306
		Criminal	17	24	19	17	43	31	86	75	44
	Pending Cases		447	437	410	614	393	651	467	364	292
	Weighted Filings		280	364	427	652	375	480	406	326	-
	Terminations		247	368	483	504	332	394	339	295	776
	Trials Completed		20	38	56	47	64	52	51	50	54
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	5.0	4.5	3.3	4.0	3.1	5.1	2.8	3.3	3.7
		Civil	11	11	8	9	12	16	14	10	11
	From Issue to Trial (Civil Only)		-	12	11	10	15	12	25	17	14
OTHER	Number (and %) of Civil Cases Over 3 Years Old		89 (10.4)	51 (2.4)	28 (4.1)	88 (4.9)	302 (9.1)	132 (5.7)	536 (10.3)	179 (9.7)	29 (10.4)
	Triable Defendants in Pending Criminal Cases Number (and %)		12 (46.2)	21 (48.8)	19 (55.9)	11 (16.9)	98 (32.9)	21 (26.9)	201 (24.3)	92 (20.9)	4 (28.6)
	Juror Usage Index		18.26	21.78	18.94	24.95	17.97	18.28	21.63	27.86	25.39
	% of Jurors Not Serving		50.3	49.6	41.3	46.8	33.7	32.8	39.4	40.5	49.0

COMPARISON OF DISTRICTS WITHIN THE CIRCUIT — YEAR ENDED JUNE 30, 1980

			AK	AZ	CA,N.	CA,E.	CA,C.	CA,S.	HI	ID	MT
OVERALL WORKLOAD STATISTICS	Filings		572	1,948	5,829	1,801	6,496	2,688	790	827	721
	Terminations		552	2,192	4,892	1,480	6,042	2,290	844	811	592
	Pending		664	2,344	4,087	1,927	5,485	2,976	1,034	729	709
	Percent Change in Total Filings Current Year	Over Last Year	11.5	-1.5	64.6	28.3	4.5	21.8	14.3	5.1	16.1
		Over 1975	10.9	-20.9	63.0	-21.7	3.6	-11.3	45.8	89.7	39.7
	Number of Judgeships		2	8	12	6	17	7	2	2	2
	Vacant Judgeship Months		.0	35.5	31.1	23.4	41.6	24.0	12.0	.0	.0
ACTIONS PER JUDGESHIP	FILINGS	Total	286	244	486	300	382	384	395	414	361
		Civil	251	182	455	246	324	297	361	372	295
		Criminal	35	62	31	54	58	87	34	42	66
	Pending Cases		332	293	341	321	323	425	517	365	355
	Weighted Filings		337	225	423	282	424	292	439	310	353
	Terminations		276	274	408	247	355	327	422	406	296
	Trials Completed		18	33	30	15	32	45	40	47	34
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	3.4	3.8	3.5	3.8	3.3	3.8	5.6	4.3	3.7
		Civil	13	9	5	8	6	5	15	5	10
	From Issue to Trial (Civil Only)		-	31	14	-	10	19	-	14	13
OTHER	Number (and %) of Civil Cases Over 3 Years Old		49 (7.8)	278 (17.3)	316 (8.2)	187 (11.1)	368 (7.7)	131 (9.8)	114 (11.5)	39 (6.1)	31 (4.9)
	Triable Defendants in Pending Criminal Cases Number (and %)		25 (56.8)	113 (13.8)	193 (61.5)	50 (21.6)	224 (24.7)	233 (14.2)	17 (33.3)	22 (59.5)	31 (48.4)
	Juror Usage Index		20.05	19.04	17.24	19.80	18.73	24.63	19.74	18.18	18.80
	% of Jurors Not Serving		36.9	36.7	34.9	41.6	36.7	50.5	40.7	39.2	48.7

COMPARISON OF DISTRICTS WITHIN THE CIRCUIT—YEAR ENDED JUNE 30, 1980

			NV	OR	WA,E.	WA,W.	GUAM	NMI
OVERALL WORKLOAD STATISTICS	Filings		820	1,909	607	2,211	343	79
	Terminations		734	1,731	568	2,015	233	75
	Pending		831	1,749	664	2,646	739	67
	Percent Change in Total Filings Current Year	Over Last Year	21.7	23.9	6.9	8.8	-18.3	-21.8
		Over 1975	12.9	30.8	17.6	27.2	190.7	.0
	Number of Judgeships		3	5	2	5	1	1
	Vacant Judgeship Months		3.1	23.0	15.0	8.6	.0	.0
ACTIONS PER JUDGESHIP	FILINGS	Total	273	382	304	442	343	79
		Civil	228	343	232	390	288	63
		Criminal	45	39	72	52	55	16
	Pending Cases		277	350	332	529	739	67
	Weighted Filings		337	306	264	304	-	-
	Terminations		245	346	284	403	233	75
	Trials Completed		39	29	28	47	4	21
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	4.8	3.9	2.6	3.5	4.0	-
		Civil	10	9	13	10	10	10
	From Issue to Trial (Civil Only)		21	15	-	23	-	-
OTHER	Number (and %) of Civil Cases Over 3 Years Old		74 (10.2)	70 (4.4)	54 (9.1)	205 (8.3)	6 (2.0)	0 (.0)
	Triable Defendants in Pending Criminal Cases Number (and %)		39 (21.9)	59 (45.4)	11 (26.8)	63 (32.3)	5 (14.7)	0 (.0)
	Juror Usage Index		19.22	17.00	17.18	17.92	37.86	35.40
	% of Jurors Not Serving		44.3	37.4	36.3	38.2	75.1	74.0

United States District Courts—National Judicial Workload Profile

			ALL DISTRICT COURTS					
			1980	1979	1978	1977	1976	1975
OVERALL WORKLOAD STATISTICS	Filings*		188,487	177,756	166,447	163,492	166,627	160,602
	Terminations		180,245	167,894	154,974	152,865	149,720	148,298
	Pending		199,019	191,120	181,217	169,744	159,085	142,178
	Percent Change in Total Filings – Current Year	Over Last Year ▶		6.0				
		Over Earlier Years ▶			13.2	15.3	13.1	17.4
Number of Judgeships			516	516	399	398	399	400
Vacant Judgeship Months			956.2	1,021.0	272.4	234.4	240.6	190.2
ACTIONS PER JUDGESHIP	FILINGS	Total	365	344	417	411	418	402
		Civil	327	299	348	328	328	294
		Criminal	38	45	69	83	90	108
	Pending Cases		386	370	454	426	399	355
	Weighted Filings**		353	344	428	422	432	400
	Terminations		349	325	388	384	375	371
	Trials Completed		38	36	47	47	49	48
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	3.7	3.7	3.2	3.7	3.4	3.6
		Civil	8	9	10	9	9	9
	From Issue to Trial (Civil Only)		15	14	13	12	11	11
OTHER	Number (and %) of Civil Cases Over 3 Years Old		20,592 (11.7)	19,089 (11.5)	16,054 (10.2)	11,835 (7.9)	9,414 (6.9)	7,563 (6.4)
	Triable Defendants** in Pending Criminal Cases Number (and %)		6,295 (32.9)	6,036 (31.0)	8,141 (38.7)	10,024 (42.5)	8,028 (28.9)	2,083 (18.5)
	Juror Usage Index		18.83	19.60	19.51	19.55	19.73	19.32
	% of Jurors Not Serving		39.1	40.8	39.5	39.6	39.7	39.9

1980 CIVIL AND CRIMINAL FILINGS BY NATURE OF SUIT AND OFFENSE													
Type of Case	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	168,789	9,043	15,563	23,287	6,290	11,067	8,640	33,489	32,539	3,783	12,944	1,496	10,648
Criminal*	18,856	1,722	1,393	364	893	22	1,988	1,294	1,617	2,096	3,273	1,830	2,364

*Filings in the "Overall Workload Statistics" section include criminal transfers, while filings "by nature of offense" do not.

**See page 129

MANAGEMENT STATISTICS

FOR UNITED STATES COURTS

1982

A REPORT

- To the Chief Justice of the United States
- To the Chairmen and Members of the Judicial Councils of the Circuits
- To the Chief Judges and Judges of the United States Courts

FROM

- The Director of the Administrative Office of the United States Courts

U.S. DISTRICT COURT
JUDICIAL WORKLOAD PROFILE

MISSISSIPPI SOUTHER

		TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN	
		1982	1981	1980	1979	1978	1977	U.S.	Circuit
OVERALL WORKLOAD STATISTICS	Filings*	2,016	1,770	1,815	1,601	1,398	1,289		
	Terminations	1,531	~~1,446~~	~~1,513~~	1,503	1,138	1,088		
	Pending	2,650	2,167	1,841	1,543	1,445	1,185		
	Percent Change in Total Filings Current Year	Over Last Year ▶	13.8					50	5
		Over Earlier Years ▶		11.0	25.8	44.1	56.2	36	5
	Number of Judgeships	3	3	3	3	3	3		
	Vacant Judgeship Months	.0	.0	.0	.0	.0	.0		
ACTIONS PER JUDGESHIP	FILINGS Total	671	590	605	534	466	430	4	1
	FILINGS Civil	641	557	588	518	428	379	3	1
	FILINGS Criminal	30	33	17	16	38	51	72	6
	Pending Cases	883	722	614	514	482	395	2	1
	Weighted Filings**	676	648	652	547	506	449	1	1
	Terminations	510	482	504	501	379	363	14	2
	Trials Completed	34	38	47	53	48	43	66	9
MEDIAN TIMES (MONTHS)	From Filing to Disposition Criminal	8.2	4.6	4.0	6.9	3.8	3.3	93	9
	From Filing to Disposition Civil	8	9	9	8	9	8	49	4
	From Issue to Trial (Civil Only)	10	13	10	13	12	13	11	1
OTHER	Number (and %) of Civil Cases Over 3 Years Old	117 4.6	100 4.8	88 4.9	61 4.1	46 3.3	28 2.5		
	Triable Defendants** in Pending Criminal Cases Number (and %)	86 74.8	71 71.0	48 73.8	30 75.0	41 67.2	39 58.2		
	Juror Usage Index	23.93	25.63	24.95	25.39	21.92	22.82	91	9
	% of Jurors Not Serving	44.6	45.5	46.8	44.9	39.0	41.1	76	7

FOR NATIONAL PROFILE AND EXPLANATION OF NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW OPEN FOLDOUT AT BACK COVER

1982 CIVIL AND CRIMINAL FILINGS BY NATURE OF SUIT AND OFFENSE

Type of Case	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	1924	86	246	118	14	52	39	532	615	16	149	5	56
Criminal*	80	4	4	-	15	1	9	8	-	7	16	9	7

*Filings in the "Overall Workload Statistics" section include criminal transfers, while filings "by nature of offense" do not.

**See Page 131.

SECOND CIRCUIT

COMPARISON OF DISTRICTS WITHIN THE CIRCUIT— YEAR ENDED JUNE 30, 1982

			CT	NY,N.	NY,E.	NY,S.	NY,W.	VT
*OVERALL WORKLOAD STATISTICS	Filings		2,829	1,565	4,485	9,424	1,363	496
	Terminations		2,246	1,307	4,149	8,735	992	444
	Pending		4,048	2,172	5,626	9,759	1,883	564
	Percent Change in Total Filings Current Year	Over Last Year	22.9	18.2	.9	7.2	-.3	7.6
		Over 1977	68.0	134.6	37.6	25.5	57.8	33.7
Number of Judgeships			5	3	10	27	3	2
Vacant Judgeship Months			.0	2.9	10.3	12.2	10.0	.0
*ACTIONS PER JUDGESHIP	[illegible]	Total	566	522	449	349	454	248
		Civil	530	493	404	321	400	224
		Criminal	36	29	45	28	54	24
	Pending Cases		810	724	563	361	628	282
	Weighted Filings*		560	496	470	382	406	231
	Terminations		449	436	415	324	331	222
	Trials Completed		43	34	47	31	38	30
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	6.7	5.0	6.1	5.3	6.2	5.8
		Civil	9	14	10	8	9	11
	From Issue to Trial (Civil Only)		34	19	18	13	34	16
OTHER	Number (and %) of Civil Cases Over 3 Years Old		585 (15.1)	246 (11.8)	414 (8.2)	506 (5.6)	231 (13.1)	7 (1.4)
	Triable Defendants in Pending Criminal Cases Number (and %)		140 (49.0)	39 (33.3)	248 (21.1)	351 (31.9)	111 (60.0)	18 (19.4)
	Juror Usage Index		22.62	18.31	21.57	20.31	15.99	15.24
	% of Jurors Not Serving		36.2	40.5	42.9	43.9	24.9	25.4

*See Page 131.

FIFTH CIRCUIT

COMPARISON OF DISTRICTS WITHIN THE CIRCUIT — YEAR ENDED JUNE 30, 1982

			LA,E.	LA,M.	LA,W.	MS,N.	MS,S.	TX,N.	TX,E.	TX,S.	TX,W.	CZ
*OVERALL WORKLOAD STATISTICS	Filings		5,751	1,155	3,012	1,191	2,016	4,300	2,575	6,279	2,677	9
	Terminations		5,492	976	2,551	1,052	1,531	4,101	1,895	5,617	2,231	43
	Pending		6,768	1,210	2,870	986	2,650	3,895	3,322	7,259	2,737	0
	Percent Change in Total Filings Current Year	Over Last Year	-.9	10.7	29.6	14.5	13.8	17.0	26.3	19.1	11.7	-30.8
		Over 1977	15.9	114.3	85.9	55.3	56.2	39.9	70.2	58.5	33.1	-99.0
	Number of Judgeships		13	2	5	2	3	9	4	13	6	1
	Vacant Judgeship Months		10.3	.0	.0	.0	.0	.0	.0	3.9	4.2	9.0
*ACTIONS PER JUDGESHIP	FILINGS	Total	442	578	602	596	671	478	644	483	446	9
		Civil	423	562	578	562	641	413	605	370	349	1
		Criminal	19	16	24	34	30	65	39	113	97	8
	Pending Cases		521	605	574	493	883	433	831	558	456	0
	Weighted Filings*		399	404	425	582	676	490	637	464	439	-
	Terminations		422	488	510	526	510	456	474	432	372	43
	Trials Completed		40	36	44	71	34	66	63	50	65	5
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	5.2	6.3	4.7	4.3	8.2	6.5	4.4	3.9	6.7	27.0
		Civil	11	7	8	7	8	7	14	12	8	37
	From Issue to Trial (Civil Only)		17	17	13	12	10	12	10	20	14	-
OTHER	Number (and %) of Civil Cases Over 3 Years Old		417 (6.3)	69 (5.8)	46 (1.6)	16 (1.8)	117 (4.4)	231 (6.5)	205 (6.5)	476 (7.8)	123 (5.3)	0 (.0)
	Triable Defendants in Pending Criminal Cases Number (and %)		90 (35.0)	19 (51.4)	16 (37.2)	19 (55.9)	86 (74.8)	186 (47.3)	44 (57.1)	418 (29.3)	288 (48.9)	0 (.0)
	Juror Usage Index		16.37	16.82	17.68	17.87	23.93	19.39	17.51	18.41	20.54	-
	% of Jurors Not Serving		43.8	35.7	49.5	40.8	44.6	44.7	37.8	38.3	60.7	.0

*See Page 131

SIXTH CIRCUIT

COMPARISON OF DISTRICTS WITHIN THE CIRCUIT— YEAR ENDED JUNE 30, 1982

			KY,E.	KY,W.	MI,E.	MI,W.	OH,N.	OH,S.	TN,E.	TN,M.	TN,W.
*OVERALL WORKLOAD STATISTICS	Filings		1,559	1,592	6,627	1,897	4,018	3,567	1,888	1,515	1,578
	Terminations		1,994	1,375	5,836	2,129	3,004	2,905	1,732	1,488	1,413
	Pending		3,244	1,862	5,905	1,790	4,927	3,891	878	949	1,536
	Percent Change in Total Filings Current Year	Over Last Year	19.8	2.6	13.8	37.0	6.5	7.6	17.9	20.3	14.3
		Over 1977	-20.8	14.5	45.0	80.8	18.8	53.1	53.4	77.8	54.0
	Number of Judgeships		5 1/2	3 1/2	13	4	10	6	3	3	3
	Vacant Judgeship Months		3.7	.0	.0	.0	24.3	.0	.0	.0	.0
*ACTIONS PER JUDGESHIP	FILINGS	Total	283	455	510	474	402	595	629	505	526
		Civil	255	394	479	437	376	556	570	437	424
		Criminal	28	61	31	37	26	39	59	68	102
	Pending Cases		590	532	454	448	493	649	293	316	512
	Weighted Filings*		226	442	517	376	437	546	552	426	517
	Terminations		363	393	449	532	300	484	577	496	471
	Trials Completed		31	33	41	34	24	26	45	60	65
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	5.4	3.5	5.7	5.5	4.6	4.5	3.6	5.2	5.8
		Civil	33	11	8	12	8	9	4	5	8
	From Issue to Trial (Civil Only)		24	17	18	16	13	14	5	8	19
OTHER	Number (and %) of Civil Cases Over 3 Years Old		1,200 (39.5)	128 (7.5)	231 (4.1)	138 (8.3)	441 (9.2)	240 (6.4)	0 (.0)	44 (5.2)	121 (8.7)
	Triable Defendants in Pending Criminal Cases Number (and %)		67 (58.8)	121 (75.2)	140 (37.7)	70 (55.1)	106 (67.5)	49 (33.1)	29 (51.8)	57 (49.1)	75 (42.6)
	Juror Usage Index		22.05	22.17	16.28	15.89	16.13	16.32	14.05	20.07	17.02
	% of Jurors Not Serving		44.8	56.2	39.1	36.8	32.1	34.1	37.4	50.2	30.1

*See Page 131.

NINTH CIRCUIT
COMPARISON OF DISTRICTS WITHIN THE CIRCUIT— YEAR ENDED JUNE 30, 1982

			AK	AZ	CA,N.	CA,E.	CA,C.	CA,S.	HI	ID	MT
*OVERALL WORKLOAD STATISTICS	Filings		638	3,147	5,989	1,960	7,690	2,310	708	753	912
	Terminations		675	2,970	5,567	1,630	7,403	2,338	750	673	814
	Pending		866	2,608	4,487	2,348	6,096	2,723	1,061	874	930
	Percent Change in Total Filings Current Year	Over Last Year	-4.2	33.2	15.8	21.8	2.9	-13.1	8.3	-.1	10.3
		Over 1977	21.3	29.3	56.4	33.9	27.5	25.4	-33.8	44.0	51.2
	Number of Judgeships		2	8	12	6	17	7	2	2	2
	Vacant Judgeship Months		.0	.0	8.3	10.3	31.7	3.1	6.4	5.9	.0
*ACTIONS PER JUDGESHIP	FILINGS	Total	319	393	499	327	452	330	354	377	456
		Civil	285	338	464	259	397	222	318	332	392
		Criminal	34	55	35	68	55	108	36	45	64
	Pending Cases		433	326	374	391	359	389	531	437	465
	Weighted Filings*		316	269	392	341	494	320	407	332	402
	Terminations		238	371	464	272	435	334	375	337	407
	Trials Completed		18	30	23	24	37	52	35	48	56
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	3.9	4.6	4.8	5.2	4.6	5.1	5.7	4.9	4.9
		Civil	9	3	4	13	5	8	17	9	9
	From Issue to Trial (Civil Only)		21	22	13	16	15	16	27	13	11
OTHER	Number (and %) of Civil Cases Over 3 Years Old		64 (7.8)	184 (9.5)	187 (4.5)	143 (7.1)	310 (5.8)	91 (6.0)	136 (13.4)	53 (6.4)	39 (4.6)
	Triable Defendants in Pending Criminal Cases Number (and %)		20 (46.5)	172 (21.2)	155 (39.1)	206 (49.0)	261 (28.3)	287 (19.1)	33 (62.3)	15 (55.6)	29 (50.0)
	Juror Usage Index		20.96	19.75	15.64	19.76	17.48	20.80	12.23	17.77	18.76
	% of Jurors Not Serving		46.6	39.3	34.7	39.6	33.5	40.4	27.8	37.5	48.3

*See Page [illegible]

NINTH CIRCUIT
COMPARISON OF DISTRICTS WITHIN THE CIRCUIT — YEAR ENDED JUNE 30, 1982

			NV	OR	WA,E.	WA,W.	GUAM	NMI
*OVERALL WORKLOAD STATISTICS	Filings		1,279	2,143	1,073	2,427	323	123
	Terminations		1,025	1,987	878	2,480	117	91
	Pending		1,481	1,923	928	2,764	986	113
	Percent Change in Total Filings Current Year	Over Last Year	11.7	-3.3	30.9	10.7	70.0	9.8
		Over 1977	84.8	64.1	110.8	64.3	236.5	.0
	Number of Judgeships		3	5	2	5	1	1
	Vacant Judgeship Months		.0	.0	.0	2.9	.0	.0
*ACTIONS PER JUDGESHIP	FILINGS	Total	426	429	537	525	323	123
		Civil	375	405	455	472	250	99
		Criminal	51	24	82	53	73	24
	Pending Cases		494	385	464	553	986	113
	Weighted Filings*		460	439	393	441	-	-
	Terminations		342	397	439	496	117	91
	Trials Completed		37	45	35	31	8	8
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	5.8	5.7	3.7	5.0	3.1	4.7
		Civil	7	7	8	9	14	6
	From Issue to Trial (Civil Only)		22	17	16	20	-	-
OTHER	Number (and %) of Civil Cases Over 3 Years Old		73 (5.5)	57 (3.2)	72 (8.8)	303 (11.6)	200 (65.8)	0 (.0)
	Triable Defendants in Pending Criminal Cases Number (and %)		98 (49.7)	54 (35.5)	26 (47.3)	50 (25.0)	50 (83.3)	5 (41.7)
	Juror Usage Index		19.29	13.93	15.56	15.96	55.27	19.33
	% of Jurors Not Serving		33.2	40.0	44.3	33.2	74.9	49.7

*See Page 131.

United States District Courts—National Judicial Workload Profile

			ALL DISTRICT COURTS					
			1982	1981	1980	1979	1978	1977
OVERALL WORKLOAD STATISTICS	Filings*		229,409	201,287	188,487	177,647	166,447	163,492
	Terminations		210,878	198,172	180,243	167,814	154,874	152,865
	Pending		219,872	202,283	199,019	191,891	181,217	188,744
	Percent Change in Total Filings—Current Year	Over Last Year ▶		13.5				
		Over Earlier Years ▶			21.2	28.6	37.3	39.8
	Number of Judgeships		515	516	516	516	399	398
	Vacant Judgeship Months		424.9	414.5	956.2	1,021.0	272.4	234.4
ACTIONS PER JUDGESHIP	FILINGS	Total	444	390	365	344	417	411
		Civil	400	350	327	299	348	328
		Criminal	44	40	38	45	69	83
	Pending Cases		427	392	386	370	454	426
	Weighted Filings		417	390	353	344	438	422
	Terminations		409	384	349	325	388	384
	Trials Completed		42	41	38	36	47	47
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	4.9	3.8	3.7	3.7	3.2	3.7
		Civil	7	9	8	9	10	9
	From Issue to Trial (Civil Only)		14	14	15	14	13	12
OTHER	Number (and %) of Civil Cases Over 3 Years Old		13,979 (7.0)	15,275 (8.4)	20,592 (11.7)	19,089 (11.5)	16,054 (10.2)	11,835 (7.9)
	Triable Defendants in Pending Criminal Cases Number (and %)		8,618 (39.7)	7,882 (39.2)	7,812 (40.8)	7,176 (37.6)	8,708 (42.7)	10,684 (46.5)
	Juror Usage Index		17.91	18.23	18.83	19.60	19.51	19.55
	% of Jurors Not Serving		38.4	38.9	39.1	40.8	39.5	39.6

1982 CIVIL AND CRIMINAL FILINGS BY NATURE OF SUIT AND OFFENSE													
Type of Case	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	206,193	12,812	30,048	29,303	7,566	8,812	10,227	37,228	34,218	4,585	17,038	1,066	13,290
Criminal*	21,351	1,731	1,712	354	1,719	793	2,024	1,577	1,622	2,097	3,693	2,033	1,995

*Filings in the "Overall Workload Statistics" section include criminal transfers, while filings "by nature of offense" do not.

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
OCT 28 1982
CLARENCE A. PIERCE, CLERK
BY________DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

TRANSCONTINENTAL GAS PIPE LINE CORP. PLAINTIFF

V. CIVIL ACTION NO. J82-0531(N)

MISSISSIPPI STATE OIL AND GAS BOARD,
ET AL. DEFENDANTS

RECUSAL ORDER

Pursuant to 28 U.S.C. § 455(a), the undersigned feels compelled to disqualify himself in the above styled and numbered proceeding for the following reason:

The undersigned has a financial interest in the subject matter in controversy. The undersigned is therefore compelled under the dictates of § 455(a) to recuse himself in this proceeding.

THIS the 27th day of October, 1982.

UNITED STATES DISTRICT JUDGE

Biloxi, Mississippi

A TRUE COPY, I HEREBY CERTIFY.
Clarence A. Pierce, CLERK
By: Carter
Deputy Clerk

538	3	82	0531	10	13	83	3	950	1				Demand $1,000	3804	66666		J82	0531 (2) (J)

PLAINTIFFS **DEFENDANTS**

TRANSCONTINENTAL GAS PIPE LINE CORPORATION vs. MISSISSIPPI STATE OIL AND GAS BOARD
and Joe R. Fancher, Jr., James F. Wood,
E. A. "Baby" Turnage, John B. Burnett
and Reese Senter, Members

Federal Energy Regulatory Commission
Amicus-Curiae
Plff-Intervenor Per Order
3-29-83

COASTAL Exploration, Inc., Deft-Intervenor
(Per Order 11-19-82)

TOMLINSON Interests, Inc., Deft-Intervenor
(Per Order 11-22-82)

GETTY Oil Company, Deft-Intervenor
(Per Order 12-2-82)

CAUSE
(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE
IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

15 USC §§717 et seq:
28 USC 1331, 1332 and 1337: Suit for declaratory judgment and injunction to prevent enforcement of of alleged unlawful rules and orders in violation of Natural Gas Act. sc

ATTORNEYS

R. Wilson Montjoy, II
Jefferson D. Stewart
Brunini Grantham Grower & Hewes
P.O. Drawer 119
Jackson, Miss. 39205
Tel: 948-3101

Thomas R. Hirsch, III, Jerome M. Feit
Office of the Solicitor
825 North Capitol St., N.E.
Washington, D.C. 20426
(202) 357-8440 (Federal Energy Regulatory Comm.)

Additional Defendants

Walker L. Watters
P. O. Box 158
Jackson, MS 39205-0158
948-3030
(Getty Oil Co.)

P. Roger Googe, Peter Stockett
Asst. Attorney General
P.O. Box 220
Jackson, Miss. 39205
Tel: 354-7130

Glenn Gates Taylor
HEIDELBERG, WOODLIFF & FRANKS
Suite 1030 Capital Towers
Jackson, MS 39201
948-3800
(Coastal Exploration, Inc.)

Vernon L. Terrell, Jr.
PLAUCHE', HARTLEY, LAPEYRE
& OTTINGER
3618 One Shell Square
New Orleans, Louisiana 70139
(504) 524-5152
(Tomlinson Interests, Inc.)

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				JS-5	
				JS-6	

DATE	NR.	J82-0311(N)(W)(X) PROCEEDINGS
10-13-82		Complaint, original and six copies, with exhibit A attached, filed.
10-14-82		Summons, original and six copies, copies having attached thereto a copy of complaint and notice, issued and handed US Marshal.
10-18-82		Affidavit of Claude R. Wallendorg, Jr., with cert. of service and exhibits, filed.
10-19-82		ORDER: That A. W. Mooney is appointed to serve process in this action pursuant to Rule 4C FRCP, filed and entered OB 1982, Page 3268. (JRC) (copy handed Brunini firm)
10-19-82		ORDER: That James Redpath is appointed to serve process in this action pursuant to Rule 4C FRCP, filed and entered OB 1982, Page 3269. (JRC)(copy handed Brunini firm)
10-19-82		Notice of Hearing for Motion for a Temporary Restraining Order before Judge Walter L. Nixon, Jr., in Hattiesburg, Miss. on 10-20-82, with cert. of service, filed. (Atty. stated motion is incorporated in complaint - not a separate instrument)
10-19-82		Summons directed to Reese Senter, original and one copy, copy having attached thereto a copy of complaint and notice, issued and handed US Marshal.
10-21-82		Notice of Hearing for Motion for Temporary Restraining Order before Judge Dan M. Russell, Jr., on 10-26-82 in Gulfport, Miss., with cert. of service, filed.
10-21-82		Motion of plaintiff for Temporary Restraining Order, with cert. of service, filed. (Notice previously filed.)
10-22-82		Marshal's return on summons directed to Reese Senter, executed, filed.
10-25-82		Return of A.W. Mooney on summons executed as to John B. Burnett, filed.
10-28-82		DEPUTY CLERK SHEET: Hearing on 10-26-82 before Judge Russell in Gulfport on Pltf's Motion for TRO. Action Taken: Granted; Pltf. to post $250,000 c/s bond. Court Reporter - Jan B. Garnon, rec'd and placed on DCSheet Board.
10-28-82		EXHIBIT to Motion for TRO: D-1, filed.
10-28-82		RECUSAL ORDER: Pursuant to 28 USC §455(a), the undersigned is compelled to disqualify himself in the above styled proceeding for the reason that he has a direct financial interest in the subject matter in controversy and must recuse himself in this proceeding, filed and entered OB 1982, Page 3436. WLN Copy mailed attys.
10-28-82		Memo mailed courtroom deputies and attorneys of record with regard to reassignment of case.
10-29-82		Bond on Temporary Restraining Order, in the amount of $250,000, with Seaboard Surety Company as Surety, approved by Bobbie Price, Cheif Deputy, at the direction of Judge Russell, filed. Original placed in safe.
11-1-82		TEMPORARY RESTRAINING ORDER: that the Miss. State Oil and Gas Board and Joe R. Fancher, Jr., James P. Wood, E. A. "Baby" Turnage, John B. Burnett and Reese Senter, its members, and their agents, etc., are restrained from either directly or indirectl seeking to enforce Order No. 409-82 and Statewide Rule 48 of the Miss. State Oil and Gas Board as to gas produced from the Harper Sand Gas Pool of East Morgantown and Greens Creek Fields in Jefferson Davis & Marion Counties, Miss. and said persons are directed to stay the effect of said order and rule as to Pltf. as to gas from pool; provided Pltf. first must give security in the sum of $250,000 for payment of costs and damages as may be incurred by any owner in these fields, bond to be approved by

(continued next page

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
Transcontinental Gas Pipe Line Corp.	Miss. State Oil and Gas Board, et al	DOCKET NO. J82-0331(R PAGE 2 OF ___ PAGES

DATE	NR.	PROCEEDINGS
cont'n from page 1		
11- 1-82		Court or by Clerk of the Court, this Order shall expire within 10 days after entry. filed and entered OB 1982, pages 3460-3461. (DMR) (copy handed Atty. Stewart, copy mailed other atty.)
11-1-82		Pltf's Motion for Extension of Temporary Restraining Order, Notice of Motion before Judge Russell, on 11-4-82, at 1:30 p.m., in Jackson, with cert. of service, filed. (copy mailed Owen)
11-2-82		Pltf's Notice of Motion for Extension of Temporary Restraining Order before Judge Russell, on 11-5-82, at 9:30 a.m., in Jackson, MS, with cert. of service, filed. (copy handed Owen)
11-3-82		Pltf's Motion for Summary Judgment, Notice of Motion before Judge Russell, on 12-6-82, at 9:00 a.m., in Gulfport, MS, with cert. of service, filed. (copy handed Owen)
11-5-82		DEPUTY CLERK SHEET: Hearing on Motion for extension of TRO before Judge Russell, on 11-5-82, in Jackson, MS; ACTION TAKEN: Extension granted; $250,000.00 c/s bond to be filed. Order to be submitted, filed.
11-5-82		TEMPORARY RESTRAINING ORDER: that the Miss. State Oil and Gas Board, it members, their agents, attorneys, etc., are hereby restrained either or indirectly seeking to enforce Order No.409-82 and Statewide Rule 48 of the Miss. State Oil and Gas Board as to gas produced from the Harper Sand Gas Pool of East Morgantown and Greens Creek Fields in Jefferson Davis and Marion Counties, MS, said Rule and Order are stayed as to gas produced from the said Pool & fields; provided Pltf. gives security in the sum of $250,000.00 for the costs and damages suffered by any owner, such bond to be approved by the Court or the Clerk of the Court; this Order shall expire within 10 days after entry unless further extended by this Court, filed and entered OB 1982, pages 3526-3527. (DMR) (Copy handed Atty. Montjoy, copy mailed)
11-5-82		Bond on Temporary Restraining Order with plaintiff as principal and Seaboard Surety Co. as surety, in the amount of $250,000.00, approved by Chief Deputy Clerk at direction of Judge Dan Russell, filed. Original placed in safe.
1-13-82		Motion of Coastal Exploration, Inc. for Leave to Intervene as a Deft., with attachment and cert. of service, filed. (Agreed to by opposing counsel)
11-19-82		ORDER: that the Motion of Coastal Exploration, Inc. for Leave to Intervene as a deft. is granted and Coastal Exploration is granted leave to intervene, filed and entered OB 1982, pages 3684-3685. (DMR) (copies mailed Attys.)
11-19-82		Motion of Tomlinson Interests, Inc. for Court to Abstain and Dismiss or Stay Pending Outcome of Parallel State Court Action, Notice of Motion before Judge Russell, on 12-6-82, at 9:00 a.m., in Gulfport, MS, with cert. of service, filed.

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
Transcontinental Gas Pipe Line Corp.	State Oil & Gas Board of Miss., et al	DOCKET NO. J82-0531(R) PAGE 1 OF ___ PAGES

DATE	NR.	PROCEEDINGS
11-19-82		Motion of Tomlinson Interests, Inc. for Leave to Intervene as a Deft., with Exhibit "A" attached and cert. of service, filed. (order being presented)
11-19-82		Motion of Coastal Exploration, Inc. for Court to Abstain and Dismiss or Stay Pending Outcome of Appeal of Parallel State Court Action, Notice of Motion before Judge Russell, on 12-6-82, at 9:00 a.m., in Gulfport, MS, with cert. of service, filed. (copy mailed Owen)
11-19-82		Exhibits A thru J, to Coastal's Motion to Abstain, filed.
11-19-82		Affidavit of Julius Ridgway, President of Coastal Exploration, Inc., filed.
11-19-82		ANSWER OF COASTAL EXPLORATION, INC., Defendant-Intervener, with cert. of service, filed.
11-22-82		ORDER: That Tomlinson Interests, Inc. is granted leave to intervene in this action as a Deft., filed and entered OB 1982, page 3703. (DMR) (copies mailed Attys. of record)
11-24-82		Transcript of hearing of the State Oil and Gas Board, filed. (3 volumes)(placed in vault)
11-29-82		ANSWER OF TOMLINSON INTERESTS, INC., DEFT-INTERVENER, with cert. of service, filed.
11-29-82		Motion of Getty Oil Company for Leave to Intervene as a Deft., with attachment and cert. of service, filed. (Order being presented)
12-1-82		ORDER: that the parties are granted until 12-10-82 to file with the Court their response memorandums to the Motion for Court to Abstain and Dismiss or Stay Pending Outcome of Appeal of Parallel State Court Action, filed by Coastal Exploration, Inc. et al, and Motion for Summary Judgment, filed by Transcontinental Gas Pipe Line Corp., filed and entered OB 1982, pages 3762-3763. (DMR) (copies mailed)
12-2-82		ORDER: that the Motion of Getty Oil Company for Leave to Intervene as deft. is granted and Getty Oil Co. is granted leave to intervene as a deft., filed and entered OB 1982, page 3772. (DMR) (copies mailed)
12-8-82		ANSWER OF GETTY OIL COMPANY to Complaint for Declaratory Judgment and Injunctive Relief, with cert. of service, filed.
12/13/82		ANSWER and other Defenses of Defts, Mississippi State Oil and Gas Board, and Joe R. Fancher, Jr., James F. Wood, E. A. "Baby" Turnage, John B. Burnett and Reese Senter, with cert. of service, filed.
12-17-82		U. S. Marshal's return showing attached summons executed as to James F. Wood, E.A. Trunage, Joe R. Fancher, Jr., & A. Richard Henderson, unexecuted as to Reese Senter & John B. Burnett, filed. (see docket entry as to service on Reese Senter & John B. Burnett on 10-22-82 & 10-25-82)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
Transcontinental Gas Pipe Line Corp	State Oil & Gas Board of Miss., et a	DOCKET NO. J82-0531(? PAGE 4 OF ___ PAGES

DATE	NR.	PROCEEDINGS
1-18-83		Federal Energy Regulatory Commission's Motion for Leave to Participate as Amicus Curiae, Notice of Motion before Judge Russell, at a time as may be designated filed.
1/24/83		Hearing on Pltf's. motion for summary judgment; & Motion of Coastal Exploration to abstain and dismiss or stay pending outcome of parallel state court action. (This motion joined in by Tomlinson & Getty Oil), before Judge Russell, in Jackson on 1/19/83. ACTION TAKEN: Reserved ruling; additional briefs to be in no later than 1/31, filed.
1-27-83		ORDER: that the motion of the Federal Energy Regulatory Commission for leave to participate in this action as amicus curiae, is granted and the Commission shall be permitted to appear and to present its views to this Court by briefs, arguments and the presentation of evidence, filed and entered OB 1983, page 510. (DMR) (copies mailed)
2-4-83		Court Reporter's Transcript of hearing before Judge Russell, on 10-26-82, in Gulfport, Ms, filed.
2-4-83		Court Reporter's Transcript of hearing before Judge Russell on 1-19-83, in Jackson, MS, filed.
2-7-83		Motion of Federal Energy Regulatory Commission for Leave to Intervene as Pltf, with attachment, Notice of Motion before Judge Russell, on 3-7-83, in Gulfport, MS, with cert. of service, filed. (copy mailed Gwen)
2-18-83		MEMORANDUM OPINION: That deft's Motion to Abstain is denied; order in accordance with this opinion shall be submitted as provided by Local Rules, filed. (Filed in Gulfport and copies mailed by Gwen)
2/28/83		ORDER: that the motions for Court to Abstain & Dismiss or Stay Pending Outcome of Parallel State Court Action is overruled, filed & entered OB 1983, Page 967. DMR (copies mailed to attys.)
2/28/83		Tomlinson Interests, Inc.'s Opposition to Motion of Federal Energy Regulatory Commission to Intervene as Party Pltf., with Statement in Opposition to Motion attached, cert. of service, filed.
3-17-83		Coastal Exploration, Inc.'s Motion to Dismiss for Lack of Jurisdiction, with attachment, Notice of Motion before Judge Russell, on 4-4-83 at 9:00 a.m., in Gulfport, MS, with cert. of service, filed. (copy placed in Gwen's box)
3-18-83		DEPUTY CLERK SHEET: Hearing on Motion of FERC for leave to intervene as pltf., before Judge Russell, on 3-17-83, in Jackson, MS; ACTION TAKEN: Granted; order to be submitted; counsel to submit short brief, no longer than 10 pages, on Rule 601, within 10 days, filed.
3-22-83		Amended Motion to Dismiss for Lack of Jurisdiction of Coastal Exploration, Inc., with Exhibits "A" & "B" attached, Notice of Motion before Judge Russell, on 4-4-83, at 9:00 a.m., in Gulfport, MS, with cert. of service, filed. (copy mailed Gwen)

PLAINTIFF	DEFENDANT	DOCKET NO. [illegible] PAGE 2 OF ___ PAGES
Transcontinental Gas Pipe Line	State Oil & Gas Board	

DATE	NR.	PROCEEDINGS
3-19-83		ORDER: that the Federal Energy Regulatory Commission is granted leave to intervene in this case and is hereby made a party to this cause, and the claim accompanying the motion of the Commission is accepted and filed and with like effect as if the Commission had been named as an original party to this cause, filed and entered OB 1983, page 1357. (WRR) (copy mailed Attys)
3-21-83		Deft., Tomlinson Interests, Inc.'s Joinder in Amended Motion to Dismiss for Lack of Juridicition filed by Coastal Exploration, Inc., with cert. of service, filed.
4-13-83		Deft's Joinder in Amended Motion to Dismiss for Lack of Jurisdiction, filed by Coastal Exploration, Inc., Notice of Hearing before Judge Russell, on 4-28-83, in Jackson, MS, with cert. of service, filed. (copy mailed Cnsl)
8-2-84		Suggestion of Automatic Stay by Trustee in Bankruptcy of Tomlinson Interests, et al filed.
12-7-84		Motion of Coastal Exploration to Dismiss with prejudice, with notice of hearing before Judge Lee as soon as counsel can be heard, with exhibits and c/s, filed.
12-21-84		ORDER: that the time for filing a response to the memorandum of Transcontinental in opposition to Coastal's Motion to dismiss on grounds of res judicata in this case shall be extended to 1-3-85, filed and entered OB 1984, page 7814(TSL)copies mailed(Ent'd 1-3-85).
12-21-84		Coastal's motion for add'l time to respond to Transcontinental's memorandum in opposition to Coastal's motion to dismiss., filed.
12-21-84		Response of FERC in opposition to motion to dismiss, with c/s, filed.
10-23-85		SCHEDULING ORDER: That joinder of other parties or amendments to the pleadings be accomplished on or before 11-29-85; that any motions be filed & noticed on or before 12-30-85; that all discovery shall be completed by all parties on or before 11-29-85, filed & entered OB 1985, Page 4800. (JRC) (counsel notified by Mag. Countiss' Office) Ent'd 10-30-85
7-16-86		Stipulation of dismissal, filed.
7-16-86		J. S. 6 CARD

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
OCT 13 1982
[illegible], CLERK
BY [illegible] DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

TRANSCONTINENTAL GAS PIPE LINE CORPORATION PLAINTIFF

VS. CIVIL ACTION NO. J82-053(N)

MISSISSIPPI STATE OIL AND GAS BOARD,
AND JOE R. FANCHER, JR., JAMES P. WOOD,
E. A. "BEBY" TURNAGE, JOHN B. BURNETT
AND REESE SENTER, MEMBERS DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

INTRODUCTION

1. This complaint seeks declaratory and injunctive relief because of the unlawful exercise of jurisdiction by the Defendant, Mississippi State Oil and Gas Board (Board), over the activities of Plaintiff, Transcontinental Gas Pipe Line Corporation (Transco), a natural gas company under the Natural Gas Act (NGA) and the Natural Gas Policy Act of 1978 (NGPA). Plaintiff seeks a declaratory judgment that the attempted exercise of jurisdiction is unlawful in that it (1) violates provisions of the United States Constitution, i.e., Article VI, Clause 2 (Supremacy Clause), Article I, Section VIII, Clause 3 (Commerce Clause), Article I, Section X, Clause 1 (Contract Clause) and

ELEVENTH CIRCUIT

COMPARISON OF DISTRICTS WITHIN THE CIRCUIT— YEAR ENDED JUNE 30, 1982

			AL,N.	AL,M.	AL,S.	FL,N.	FL,M.	FL,S.	GA,N.	GA,M.	GA,S.
*OVERALL WORKLOAD STATISTICS	Filings		3,415	1,449	1,356	999	4,155	4,815	3,770	1,278	1,451
	Terminations		3,050	1,180	1,091	765	3,723	6,929	3,445	960	1,204
	Pending		2,188	1,082	966	941	4,610	6,630	3,261	1,028	1,268
	Percent Change in Total Filings Current Year	Over Last Year	32.1	38.3	31.9	16.3	8.3	-3.0	12.7	27.3	21.4
		Over 1977	45.3	54.1	56.4	36.7	34.7	-5.9	26.1	45.2	43.9
	Number of Judgeships		7	3	2	3	9	12	11	2	3
	Vacant Judgeship Months		5.9	.0	4.5	11.7	10.1	8.5	4.0	.0	.0
*ACTIONS PER JUDGESHIP	[illegible]	Total	488	483	678	333	462	401	343	639	484
		Civil	444	445	628	296	423	336	300	592	442
		Criminal	44	38	50	37	39	65	43	47	42
	Pending Cases		313	361	483	314	512	553	296	516	423
	Weighted Filings*		412	355	542	271	360	386	378	604	433
	Terminations		436	393	546	255	414	577	313	480	401
	Trials Completed		54	51	61	45	36	56	36	41	68
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal	2.9	3.7	5.1	5.4	5.2	6.0	5.2	4.2	4.5
		Civil	5	4	6	6	11	7	9	7	7
	From Issue to Trial (Civil Only)		10	6	12	14	15	11	15	12	13
OTHER	Number (and %) of Civil Cases Over 3 Years Old		29 (1.4)	19 (1.9)	20 (2.2)	37 (4.3)	291 (6.6)	298 (7.6)	105 (3.4)	21 (2.2)	61 (5.0)
	Triable Defendants in Pending Criminal Cases Number (and %)		57 (66.3)	33 (70.2)	21 (24.4)	29 (18.8)	167 (44.7)	1,001 (48.9)	144 (47.2)	19 (46.3)	36 (45.0)
	Juror Usage Index		16.66	18.07	17.11	17.96	17.67	22.37	17.49	19.81	19.15
	% of Jurors Not Serving		40.6	24.8	21.3	27.2	35.7	45.2	41.5	30.8	34.7

*See Page 131.

Amendment XIV (impairment of contract and deprivation of property); (2) has been preempted by pervasive federal regulation over natural gas companies; and (3) is beyond the authority of the Board as granted to it by the Mississippi legislature. Plaintiff seeks a temporary restraining order (TRO) and a preliminary and permanent injunction ordering that Defendants be restrained from (1) proceeding further with or attempting to enforce the Board's Order No. 409-82 in its Docket Nos. 287-82-418 and 287-82-467 in which jurisdiction over Transco's purchase of natural gas has been asserted and (2) proceeding further with or attempting to enforce the Board's Statewide Rule 48 against Transco.

JURISDICTION

2. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331, 1332 and 1337. The federal question jurisdiction of the Court is invoked in that the matter in controversy arises under the constitution and laws of the United States, more particularly under: (A) Article VI, Clause 2 of the Constitution of the United States, (B) Article I, Section VIII, Clause 3 of the Constitution of the United States, (C) Article I, Section X, Clause 1 of the Constitution of the United States, (D) Amendment XIV to the Constitution of the United States, (E) the Natural Gas Act, 15 U.S.C. §§ 717 et seq., (F) the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 et seq., and (G) the rules, regulations and orders duly promulgated by the Federal Energy Regulatory Commission under the aforesaid Acts.

The jurisdiction of the Court is also invoked under 28 U.S.C. § 1332 (diversity of citizenship) in that Plaintiff and Defendants are citizens of different states and the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs.

THE PARTIES

3. Plaintiff is a corporation organized and existing under the laws of Delaware and has its principal place of business in the state of Texas. Plaintiff's primary business is the purchase, transportation and sale of natural gas in interstate commerce. Plaintiff is doing business in the state of Mississippi and is qualified to do business herein.

4. Defendant Mississippi State Oil and Gas Board is an agency of the state of Mississippi organized and empowered pursuant to the Conservation Act of 1948, Miss. Code Ann. §§ 53-1-1 et seq. (1972). Defendant Joe R. Fancher, Jr., is a member and chairman of said board and defendants James P. Wood, E. A. "Reby" Turnage, John B. Burnett and Reese Senter are members thereof. The Board is required under the provisions of Miss. Code Ann. § 53-1-5(a) (1972) to establish its principal office in Jackson, Mississippi, in this District and Division, and each of the foregoing named Defendants maintains an office and performs his official duties at said statutorily designated office. Individual defendants are also residents of the State of Mississippi.

FACTS GIVING RISE TO THIS ACTION

5. In 1938, Congress enacted the Natural Gas Act, 15 U.S.C. §§ 717 et seq., in order to regulate the transportation and sale for resale of natural gas in interstate commerce and natural gas companies engaged in such transportation and sale. Under the NGA the Federal Power Commission (now the Federal Energy Regulatory Commission, or FERC) is the administrative agency designated to regulate all such transactions and companies. Congress thus preempted the field, vesting exclusive federal jurisdiction in FERC over natural gas companies and their purchase, transportation, and sale of natural gas in interstate commerce. Plaintiff, Transco, is a natural gas company under the NGA.

6. Congress subsequently passed the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 et seq., expanding federal jurisdiction and regulation to include intrastate sales of natural gas and modifying the jurisdiction of FERC over certain "first sales" of natural gas and producers of said gas. However, the NGPA did not eliminate FERC's exclusive jurisdiction over natural gas companies such as Transco, who purchase gas in Mississippi and other states and transport that gas across state lines for resale. Under the NGA, as amended by NGPA, federal regulation still preempts any state regulation of the purchase, transportation and resale of natural gas by a natural gas company and exclusively regulates the intricate relationship between the

prices paid by natural gas companies for natural gas and the prices charged by those companies for resale of that natural gas.

7. Certain interest owners in gas wells located in Greene Creek and East Morgantown Fields, Marion County, Mississippi, petitioned the Board (Docket Nos. 287-82-418 and 287-82-407) to force Transco to purchase from said working interest owners natural gas which Transco had no contractual obligation to take and to force Transco to purchase said gas under extremely burdensome terms and conditions. Said petitions were based primarily on Statewide Rule 48 of the Board which states:

> Each person now or hereafter engaged in the business of purchasing oil or gas from owners, operators, or producers shall purchase without discrimination in favor of one owner, operator or producer against another in the same common source of supply.

8. Prior to the Board's hearing on this matter, Transco filed a brief with the Board asserting the Board's lack of jurisdiction over Transco to grant the relief requested in said petition. Specifically, Transco asserted that the NGPA had preempted the field as to regulation of pipeline companies in interstate commerce, leaving the Board without jurisdiction to force Transco to purchase gas from working interest owners with which Transco had no contractual agreement or to dictate terms and conditions of said purchase. Further, Transco challenged the jurisdiction of the Board on the ground that its enabling legislation, Miss. Code Ann. §§ 53-1-1 et seq. (Supp. 1982), did

not authorize it to promulgate Rule 48 or to assert jurisdiction over interstate pipeline companies purchasing gas in Mississippi.

9. A hearing before the Board was held on September 14-16, 1982. At that time the Board considered the jurisdictional issues raised by Transco and heard testimony relative to the merits of the petitions.

10. On October 13, 1982, the Board entered its Order No. 409-82 (dated September 16, 1982) asserting its jurisdiction over Transco and its authority to enforce Rule 48 against Transco. The Board further found that Transco had violated Rule 48 and has ordered Transco to "comply with Statewide Rule 48" and to "ratably take and purchase gas without discrimination in favor of one owner, operator or producer against another" from the Harper Sand Gas Pool of Greens Creek and East Morgantown Fields, Marion County, Mississippi. A copy of this order is attached as Exhibit A.

11. The Board has failed and refused to declare what it means by "ratably take" or "purchase without discrimination." Both the Board's Order No. 409-82 and Rule 48 are unconstitutionally vague as men of common intelligence must necessarily guess at its meaning. To be subjected to a penalty for violation of said rule would be a denial of due process.

12. Transco has fully exhausted the administrative remedies available to it to avoid or prevent the assertion of jurisdiction by the Board.

13. The Board, in asserting jurisdiction over Transco and in seeking to enforce Rule 48, has unlawfully invaded the

exclusive regulatory jurisdiction of the FERC over natural gas companies. Further, in seeking to enforce Rule 48 by its Order No. 409-82, the Board has exceeded the statutory authority given it under the Conservation Act of 1948, Miss. Code Ann. §§ 53-1-1 et seq. (1972).

14. Defendants have wholly failed and refused to regulate production from gas wells and to allocate said production among the various producers in gas fields as necessary and required by the Conservation Act of Mississippi. More specifically, Defendants have indicated that they will not change their current practice of allowing all gas wells in Mississippi to produce at their maximum deliverability, despite the acknowledged serious oversupply of gas currently faced by Transco and other interstate pipeline companies. Defendants' refusal to consider reduction and allocation of production from gas wells and its attempt to enforce Statewide Rule 48 by requiring Transco to purchase gas it is not contractually obligated to take will result in immediate, irreparable harm to Transco.

15. Transco is threatened with immediate suit for an injunction by the Board, or upon its default by an interested party, in a Mississippi chancery court if Transco does not comply with the orders of the Board. Transco is also threatened with civil penalties of up to $2500 per day if it does not comply with the orders of the Board.

16. If Transco attempts to comply with the orders of the Board, as interpreted by various producers in these fields, it

faces irreparable harm and potential conflict with regulation of its transportation and resale of said natural gas by the FERC, to wit:

(a) If Transco has to purchase all gas allowed to be produced from the six wells listed in Board Order No. 409-82 it would have to reduce its purchase of natural gas from other fields in Mississippi or from other fields in other states which it is contractually obligated to take. Transco's failure to take this gas from other fields would create additional obligations to pay for said gas, even though not taken, under contractual "take or pay" clauses and could amount to over $21,000,000 annually. Such increased take or pay obligations would add to the negative impact that is affecting Transco's ability to obtain external financial capital.

(b) If Transco were to reduce its takes of gas from other fields in Mississippi in order to comply with Order No. 409-82, it could stand to incur similar requirements to take gas from those fields not under contract at dictated terms and conditions, with the threat of enforcement thereof.

(c) Order No. 409-82 apparently requires Transco to purchase gas which is contractually committed and dedicated to another interstate gas pipeline company.

(d) Transco is subject to the jurisdiction of the FERC for, among other things, approval to charge and collect from its resale customers the cost of gas purchased by it. This is commonly referred to as the purchased gas adjustment (PGA). Attempting to comply with Order No. 409-82, which may be construed to require Transco to purchase quantities of gas it is not contractually obligated to take and to pay prices for said gas unreasonably in excess of its approved resales rates and the current market value of gas, will raise Transco's PGA rates above that presently approved by FERC. Said increase cannot be submitted for approval before May 1, 1983 and, should it not be approved by FERC, could result in a loss to Transco of over $144,000 per day.

(e) Under present market conditions, the increase in the cost of purchased gas and the cost of service effect of additional "take or pay" obligations which would result from attempting to comply with Order No. 409-82 and Statewide Rule 48, as now apparently being interpreted, would cause Transco's resale rates to be less competitive with other natural gas pipelines and would cause Transco's distribution company customers to face increased competition from alternate fuels. These competitive pressures could lead to significant loss of markets by Transco.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays:

A. That, pending preliminary hearing herein, a temporary restraining order (TRO) be issued enjoining the Defendants from enforcing or further prosecuting the Board's Order No. 409-82 and Statewide Rule 48 and specifically enjoining same from seeking to enforce these orders by suits for injunction or penalties in the state courts of Mississippi.

B. That, pending final hearing herein, a preliminary injunction issue enjoining the Defendants from enforcing or further prosecuting its Order No. 409-82 and Statewide Rule 48 and specifically enjoining same from seeking to enforce these orders by suits for injunction or penalties in the state courts of Mississippi.

C. That pending preliminary hearing herein, a TRO be issued directing the Mississippi State Oil and Gas Board to stay the effect of its Order No. 409-82 in Dockets No. 287-82-418 and 287-82-467 to the extent said order is directed to Transco.

D. That, pending final hearing herein, a preliminary injunction issue directing the Mississippi State Oil and Gas Board to stay the effect of its Order No. 409-82 in Dockets No. 287-82-418 and 287-82-467 to the extent said order is directed to Transco.

E. That, upon final hearing and determination, this Court order, adjudge and decree that the action of the Mississippi State Oil and Gas Board in promulgating Order No. 409-82 as directed to Transco, was erroneous and wholly null and void, and declare that the Mississippi State Oil and Gas Board has no jurisdiction over Transco, nor over its purchase of gas for transportation and sale in interstate commerce.

F. That, upon final hearing and determination, this Court order, adjudge and decree that the Defendant, Mississippi State Oil and Gas Board, be perpetually enjoined from further attempted enforcement of Rule 48 against a "natural gas company" under the NGA, as amended by the NGPA.

G. That the Plaintiff have such other and further relief as the court may deem just and proper.

Respectfully submitted,
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BEFORE THE STATE OIL AND GAS BOARD OF MISSISSIPPI

IN RE: PETITION OF COASTAL EXPLORATION, INC.
TO REQUIRE TRANSCONTINENTAL GAS PIPE LINE
CORPORATION TO RATABLY TAKE AND PURCHASE
WITHOUT DISCRIMINATION GAS PRODUCED FROM
THE GETTY OIL COMPANY - ROGERS 28-11 WELL
NO. 1, THE GETTY OIL COMPANY - SIPP 20-9
WELL NO. 2, AND THE TOMLINSON INTERESTS,
INC. - WILLOUGHBY 3-5 WELL NO. 1 IN THE
GREENS CREEK AND EAST MORGANTOWN FIELDS,
MARION COUNTY, MISSISSIPPI

FILED FOR RECORD
OCT 13 1982
STATE OIL AND GAS BOARD
A. Richard Henderson, Supervisor

DOCKET NO. 287-82-418
287-82-467

ORDER 411-82

ORDER

This day this cause came on for hearing on the Petition of Coastal Exploration, Inc. ("Coastal") and the Joinder Petition of Wiley Fairchild, Rodney Fairchild, and W. R. Fairchild Construction Company, Ltd. (all of whom are hereinafter referred to as the "Fairchilds") to require Transcontinental Gas Pipe Line Corporation ("Transco") to comply with Statewide Rule 48 of the Rules and Regulations of this Board with regard to Transco's purchase of gas from a common source of supply in the Greens Creek and East Morgantown Fields of Marion County, Mississippi. The Board having considered the Petition, the responsive pleadings thereto, the evidence and testimony, and the argument of counsel thereon, finds that the Petition is well taken and should be granted.

The Board makes the following findings of fact:

1.

This Board has jurisdiction over the parties and the subject matter of the Petition. Lawful notice of the hearing of this matter has been given in the time and manner required by law and the proofs of publication are on file with this Board.

2.

The following wells are completed into and are producing from the Harper Sand Gas Pool which is a common source of supply ("common pool") of natural gas located in the Greens Creek and East Morgantown Fields of Marion County, Mississippi:

EXHIBIT A

WELL	LOCATION	DATE OF FIRST GAS GAS SALES FROM COMMON POOL
Getty Oil Company-Rogers 28-11 Well No. 1	§28-5N-19W Marion County, Miss. Greens Creek Field	April 1981
Getty Oil Company-Sipp 20-9 Well No. 2	20-5N-19W Marion County, Miss. Greens Creek Field	October 1981
Tomlinson Interests Inc.-Willoughby 3-5 Well No. 1	§3-T4N-R19W, Marion County, Miss. East Morgantown Field	April 1982
Getty Oil Company-Buckley 33-6 Well No. 1	§33-5N-19W, Marion County, Miss. East Morgantown Field	April 1981
Florida Exploration Company-Carlisle 4-2 Well No. 1	§4-T4N-R19W Marion County, Miss. East Morgantown Field	April 1982
Florida Exploration Company-Barnes 29-1 Well No. 1	§29-5N-19W Marion County, Miss. Greens Creek Field	July 2, 1982

3.

Coastal owns small undivided working interests in four of the foregoing wells which are completed into and producing from the said common pool, to-wit: In the "Rogers" Well, a .0261220 leasehold working interest; in the "Sipp" Well, a .0066558 leasehold working interest; in the "Willoughby" Well, a .00468750 leasehold working interest; and in the "Barnes" Well, a .0015625 leasehold working interest. By virtue of its said ownership, Coastal owns and has the right to its fair and equitable share of gas produced from the common pool by the said wells. Coastal participated in drilling each of the said wells, voluntarily paid its share of drilling and completion costs, and has timely and regularly paid its share of operating costs.

4.

All of the wells which are completed into and produce from the said common pool have been classified by this Board as deep, high-cost wells under Section 107(C)(1) of the Natural Gas Policy Act of 1978 (NGPA).

5.

Transco heretofore entered into gas contracts with Getty Oil Company ("Getty") and Tomlinson Interests, Inc. ("Tomlinson") providing for Transco to purchase gas produced from the common pool by the said Rogers, Sipp, and Willoughby Wells, among other wells. Transco also contracted with Florida Exploration Company, the operator of the Carlisle and Barnes wells, to purchase all of the gas produced from the common pool by the Carlisle and Barnes Wells and tendered to Transco by the operator.

6.

From the date of first production from the common pool by the said wells, including the Rogers, Sipp and Willoughby Wells in which Coastal owns interests, and continuing until on or about July 1, 1982, each of the said wells (with the exception of the Florida-Barnes Well which did not begin production until July 2, 1982) produced at its maximum efficient rate of flow and Transco took ratably and purchased without discrimination among the owners in the wells all of the gas produced from the common pool by all of the wells, including Coastal's share of gas. Getty and Tomlinson, as the operators of the Rogers, Sipp, and Willoughby Wells, produced and delivered Coastal's share of gas to Transco and Transco took and purchased Coastal's share of gas on the same terms and conditions and at the same price as Transco purchased the said operators' share of gas produced from the common pool by the said wells even though Coastal was not a signatory party to a written gas contract with Transco covering these wells. The operators sold Coastal's share of gas pursuant to the operators' authority under operating agreements and Transco took and purchased Coastal's share of gas on the same terms and conditions and at the same price provided for in the operators' contracts with Transco.

7.

In May 1982, Transco advised Getty that effective with production beginning on and after June 1, 1982 Transco would no longer take or purchase that gas produced from the common pool by the Rogers and Sipp Wells which was attributable to the interest of Coastal and any other owners in the wells who were not signatory parties (those persons being referred to herein as "non-signatory owners") to gas contracts with Transco, but Transco would continue to take and purchase that gas produced from the common pool by the said wells which was attributable to the interest of the operators and other owners in the wells who were signatory parties to written gas contracts with Transco. At the request of Getty, this date was extended to July 1, 1982. Transco gave Tomlinson a like notice as to the Willoughby Well, to be effective August 19, 1982.

8.

Because of Transco's announced intention to refuse to continue to take and purchase Coastal's and the other non-signatory owners' share of gas produced from the common pool by the said wells, Getty notified Coastal and the other non-signatory owners that effective July 1, 1982 their gas would not be produced from the Rogers and Sipp Wells unless they obtained their own purchaser and their own gas contract. Tomlinson gave Coastal a similar notice as to the Willoughby Well, to be effective August 19, 1982.

9.

Coastal then requested Transco to continue to purchase Coastal's share of gas produced from the common pool by the said wells on the same terms and conditions as Transco purchased gas from the operators of the wells or to give Coastal a contract like Transco had given the operators; however, Transco refused to do so prior to the filing of the Petition in this docket. After the Petition in this docket was filed, Transco then offered to buy Coastal's gas (and the other non-signatory owners' gas) on terms and conditions different from those on which Transco had purchased Coastal's gas (and the other non-signatory owners' gas) prior to July 1, 1982, and different from those on which Transco was continuing to buy the operators' gas. Two of the major differences were Transco's proposal to purchase Coastal's gas subject to a so-called "market-out clause" and at a price per MMBTU which was substantially lower than the price to be paid by Transco to the operators for the operators' share of gas produced from the same pool through the same wells. Coastal did not agree to this proposal because Coastal believed that the proposal discriminated against Coastal and violated Statewide Rule 48, and that Coastal could not be forced to accept a discriminatory price and discriminatory conditions.

10.

Effective July 1, 1982 as to the Getty-Sipp and Rogers Wells, and effective August 19, 1982 as to the Tomlinson-Willoughby Well, Transco ceased to take and purchase gas attributable to Coastal's interest and the interests of any other non-signatory owner in the wells until and unless an owner accepted Transco's different offer. As a result, Transco's takes of gas and the rates of production from the common pool by these wells were "cut back" to below the maximum efficient rate of flow of the wells so that, for all practical purposes, the wells produced only and Transco purchased only a rate of production equal to the operators' and other signatory parties' interest in the maximum efficient rate of flow from the wells. However, as to the Florida-Carlisle and Barnes Wells, Transco continued to take gas from these wells at, for all practical purposes, the maximum efficient rate of flow of the wells and to purchase the non-signatory owners' gas which was produced from these two wells and tendered to Transco by Florida, the operator, on the same terms and conditions and at the same price which Transco paid for the operators' gas produced from these two wells. Thus, while the Sipp, Rogers and Willoughby Wells were cut-back to below their respective maximum efficient rates of flow because of Transco's refusal to take and purchase gas, the Barnes and Carlisle Wells continued to be produced at their respective maximum efficient rates of flow because of Transco's takes and purchases of gas from those wells. The result has been and, if allowed to continue, will be non-uniform, disproportionate and unratable withdrawals of gas from the common pool causing undue drainage between tracts of land, that is, drainage and undue drainage from the Getty and Tomlinson operated units producing from the common pool to the Florida operated units producing from the common pool. The result has also been and, if allowed to continue, will be one or more owners in the common pool producing more than their just and equitable share of the production from the pool.

11.

Transco's course of conduct has been to discriminate against the owners (like Coastal) of relatively small undivided working interests in the Sipp, Rogers and Willoughby Wells and the common pool produced by the wells simply because they are owners of relatively small undivided interests. From the date of first production by the wells until on or about July 1, 1982, Transco ratably took and purchased without discrimination the non-signatory owners' gas which was produced from the common pool and tendered to it by the operators on the same terms and conditions and at the same price at which Transco purchased the operators' gas produced from the wells. However, on and after July 1, 1982 in the case of the Sipp and Rogers Wells, and on and after August 19, 1982 in the case of the Willoughby Well, Transco has not ratably taken and purchased without discrimination from the common pool but in fact has discriminated in its purchases of gas from the common pool in favor of the operators and against Coastal, and the other non-signatory parties owning interests in these wells, by first refusing to purchase their gas at all, and then, after the Petition in this docket was filed, offering to purchase their gas but on different terms and conditions and at a different - and much lower - price than that at which Transco had been purchasing their gas and at which Transco proposed to continue purchasing the operators' share of gas produced from the common pool by these same wells. Transco's course of conduct since July 1, 1982 has simply been not to "purchase without discrimination in favor of one owner, operator, or producer against another in the same common source of supply" as required by Statewide Rule 48 of this Board.

12.

The Board finds that Transco's refusal to ratably take and purchase without discrimination Coastal's share of gas produced from the said common pool from which Transco is purchasing the operators' gas produced from the common pool by very same wells and other wells completed into the common pool (1) is discriminatory in favor of the operators against Coastal and thereby violates Rule 48 of the Statewide Rules and Regulations of this Board; (2) constitutes "waste" as defined by Miss. Code Annot. §53-1-3 because, among other things, it abuses the correlative rights of Coastal in the common pool, results in non-uniform, disproportionate and unratable withdrawals of gas from the common pool causing undue drainage between tracts of land, and will have the effect and result of some owners in the pool producing more than their just and equitable share of gas from the common pool to the detriment of Coastal; and (3) does not protect the co-equal and correlative rights of Coastal in the said common pool of gas, but violates, damages, and infringes upon Coastal's said rights. The Board further finds that such discrimination and waste should be prohibited.

13.

The Fairchild's Joinder Petition filed in this docket seeks for the Fairchilds the same relief sought by Coastal. The Fairchilds are owners of small undivided interests in the Getty-Rogers Well and, having no written contract with Transco, are in the same posture as Coastal, having received the same notices from Getty relative to Transco's refusal to continue purchasing their gas produced from the Rogers Well and having been offered the same type of different proposal as Transco offered Coastal. Therefore, The Board's findings set forth in Paragraph 12 above also apply as to the Fairchilds' interests.

14.

Inexco Oil Company ("Inexco") has also made an entry of appearance in this docket pursuant to the statutes and the rules of this Board which liberally allow persons interested in the subject matter to be heard. Inexco is the owner of interests in the Rogers, Sipp, Willoughby and Carlisle Wells and, having no written contract with Transco, is in the same posture as Coastal, having received notices relative to Transco's refusal to continue purchasing Inexco's gas produced from the Rogers, Sipp and Willoughby wells and having been offered the same type of proposal as Transco offered Coastal. Therefore, the Board's findings set forth in Paragraph 12 above also apply as to Inexco's interests.

IT IS, THEREFORE, ORDERED AND ADJUDGED by the State Oil and Gas Board of Mississippi that Transcontinental Gas Pipe Line Corporation ("Transco") is hereby ordered immediately and forthwith to comply with Statewide Rule 48 of the State Oil and Gas Board of Mississippi in its purchases of gas from the said Harper Sand Gas Pool in Greens Creek and East Morgantown Fields, and that, if Transco chooses and elects to take and purchase gas produced from the said common pool and the wells producing therefrom, Transco shall ratably take from the wells producing from the common pool; and shall ratably take and purchase gas without discrimination in favor of one owner, operator or producer against another in the said common source of pool; and, specifically, in the event it so chooses and elects to take and purchase gas from the said common pool, Transco shall ratably take and purchase without discrimination in favor of the operators Getty and Tomlinson against Coastal, the Fairchilds, and Inexco.

DATED, this the 16th day of September, 1982.

STATE OIL & GAS BOARD OF MISSISSIPPI

By: Joe R. Fancher, Jr.
CHAIRMAN

STATE OF MISSISSIPPI
COUNTY OF HINDS

I hereby certify that the foregoing is a true and correct copy of Oil & Gas Board Order # [illegible]-82 now appearing on file and of record in the office of the State Oil and Gas Board, at Jackson, Mississippi.

This the 4th day of October, 1982

A. Richard Henderson
A. RICHARD HENDERSON
Supervisor
State Oil & Gas Board

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July 27, 1988

By HAND

Rep. Don Edwards, Chairman
House of Representatives,
Subcommittee on Civil and
Constitutional Rights,
Committee on the Judiciary
2307 Rayburn House Office Bldg.
Washington, D.C. 20515

Dear Chairman Edwards:

I write to submit to the Subcommittee a Justice Department document which I received only this morning through discovery in the post-conviction proceeding brought by Judge Nixon. Although I write a day after the record was to close in the Subcommittee's proceeding on House Resolution 407, I would ask the Subcommittee to accept this item into the record since I did not receive it until this morning, and because of its extraordinary significance.

On June 21, 1988, Judge Mangle ordered the government to produce certain materials in the post-conviction proceeding. The government sought to avoid producing one document, and submitted that item to Judge Mangle for in camera inspection. In an Order dated July 20, 1988, but not filed with the clerk in Mississippi until July 25, 1988, Judge Nangle ordered the production of a portion of that document. (See Attachment A.)

The government now has chosen to produce the entire memorandum, dated March 22, 1985 and prepared and signed by Judge Nixon's prosecutors, that recommended the federal indictment of Drew Fairchild on drug charges ("Weingarten Memorandum"). (See Attachment B). This Memorandum provides powerful reinforcement for our contentions of prosecutorial overreaching and abuse. We have argued that one of the critical undisclosed inducements offered to Wiley Fairchild for his testimony was the federal prosecution of his son, Drew, in March 1985. That federal prosecution appeared to be designed to protect Drew from the state prosecutors. Wiley Fairchild has testified before the Subcommittee that the federal prosecutors promised to do what they could to help Drew. Tr. 7/7/88, p. 60. The lead prosecutor, Reid Weingarten, has made a series of evasive and misleading statements on this subject, including his testimony before the Subcommittee.

(i) In a letter to Judge Nixon's trial counsel dated a few weeks before Judge Nixon's trial, Weingarten responded to counsel's suggestion that the federal government had made an undisclosed "deal" with Drew Fairchild. Weingarten wrote that, after reviewing his files, he could make the following representations about Drew's prosecution (Attachment C) (emphasis added):

> [In March 1985], Fairchild's attorney contacted us and requested that we proceed federally against Fairchild. No agreements, deals, or promises were made with this attorney.
>
> In mid-March, we decided to seek an indictment of Drew Fairchild. While the request of Fairchild's attorney was noted, it was but one of several factors weighing into the decision to recommend an indictment. The primary factor was our belief that by March, 1985, the drug case was a federal matter that could best and most fairly be handled in Federal Court.

(ii) In an affidavit dated May 12, 1988, Weingarten stated:

> I never represented to Wiley Fairchild that I would do anything with regard to his son, Drew Fairchild, except to attempt to see to it that he was treated fairly by the Government. I did advise Fairchild's lawyers and Drew Fairchild that I would seek to make sure that he was not punished by the State of Mississippi for his cooperation with the United States. None of this was in the form of a promise to Fairchild as part of a plea bargain or in return for his testimony. It was merely a statement of fact as to my intentions in regard to the treatment of another witness in the case.

(iii) In testimony before the Subcommittee, Weingarten claimed that he had no recollection of discussing Drew's legal situation with Wiley Fairchild, and that he did not recall telling Wiley he would do what he could to help Drew. Tr. 6/9/88, p. 126.

(iv) Also before the Subcommittee, Weingarten claimed that he did not know what Wiley wanted for his son, Drew. Id. at 129.

(vi) Weingarten told the Subcommittee that Drew's lawyer said that Drew was being punished by state officials for cooperating with the federal prosecution of Bud Holmes, but that Weingarten was "skeptical" of that claim. Id. at 133.

(vii) Weingarten also told the Subcommittee that the call from Drew's lawyer requesting a federal indictment "caused us to go back to the drawing board and say what's the fair thing to to at this point." Id. at 134 (emphasis added).

(viii) Weingarten told the Subcommittee that Drew's lawyer may not have wanted Drew to be indicted federally but "may have been looking for immunity." Id. at 135.

(ix) Before the Subcommittee, Weingarten was asked at least five times if Drew's lawyer did not want a federal indictment to ensure that Drew received a shorter prison sentence than he would get in state court. Weingarten responded with a variety of evasions, admitting only that Drew's lawyer "may" have sought a federal prosecution to get a shorter prison term for his client. Id. at 136-138, 142.

Weingarten's Memorandum of March 22, 1985, which carries his name and apparently was initialed by him and a colleague, is considerably more informative. It establishes the following points which we have alleged but which Weingarten has either denied or evaded:

1. The Primary Purpose for Indicting Drew Federally Was To Ensure "The Cooperation of Drew And His Father, Wiley, in Prosecutions Of . . . Judge Nixon" -- In explaining the arguments in favor of indicting Drew, the Weingarten Memorandum lists the following reason first, clearly as the most important reason (emphasis added):

> (1) We need the cooperation of Drew and his father, Wiley, in prosecutions of Bob Royals (presently under indictment), Bud Holmes (whom we hope to indict soon) and Judge Nixon. To the extent that indicting Drew now is desired by both Drew and his father, failure to do so could jeopardize the investigation.

This is extraordinary material. It establishes, despite Weingarten's many evasions and omissions in his letter and his sworn testimony, that the "primary" motive behind the federal indictment of Drew Fairchild was to ensure the "cooperation of Drew and his father, Wiley, in prosecutions of . . . Judge Nixon." Moreover, it establishes that Weingarten knew that "both Drew and his father" "desired" a federal indictment, and that Weingarten feared that failure to indict Drew federally "could jeopardize the investigation."

This information plainly should have been disclosed to Judge Nixon's counsel prior to trial, since the prosecutors surely understood that the federal indictment of Drew was designed to ensure Wiley's cooperation against Judge Nixon. The pretrial discovery order directed the prosecutors to disclose "anything else that has been given or promised to any of the government's witnesses," but the prosecutors never disclosed this episode. Even more disturbing is that the prosecutors affirmatively concealed this information in Weingarten's letter to Judge Nixon's counsel of January 7, 1986. That letter never discloses that Drew was indicted federally to ensure the cooperation of Drew and Wiley against Judge Nixon. Instead, the letter claims that the "primary factor" in the decision to indict Drew federally was that "the drug case was a federal matter that could best and most fairly be handled in Federal Court." See Attachment C. That was not true.

2. The Federal Indictment Was Designed to Squelch Drew's State Prosecution -- In describing the approach from Drew's lawyer, the Weingarten Memorandum states that Drew's lawyer has promised that Drew will plead guilty "to a federal drug charge," and that "Under Mississippi law 'a conviction or acquittal under federal law . . . for the same act is a bar to

prosecution in this state.'" The Weingarten Memorandum also cautions about the appearance of the sequence "when, right after the state decides to prosecute Drew vigorously, we step in and prevent it." (Emphasis in original.)

3. The Federal Prosecutors Intended To Conceal Their Purpose To Aid Drew And Wiley -- The Weingarten Memorandum makes clear that the federal prosecutors understood that any indictment of Drew would be a "favor" to him and would have to packaged so that it would not appear to be a "favor":

> Ironically, our indictment of Drew would appear to be a 'favor' to him, and it is not in our interest to appear to be helping him too much when he is our witness. To minimize this, any plea agreement we made would contain no 'deals' or promises to recommend a lenient sentence, and at sentencing we would lay out the facts of Drew's smuggling involvement as well as his cooperation in as even handed a fashion as possible.

4. The Federal Prosecutors Suspected Bud Holmes Of Controlling The State Criminal Justice System -- The Weingarten Memorandum also alleges that the district attorney in Forrest County and the local judge "are friendly with and, we believe, controlled by Bud Holmes," and expressed concern that if Drew were prosecuted by the state, the district attorney would request access to federal files and "Given the D.A.'s apparent sympathies with Holmes (and therefore Royals) we believe anything we agreed to turn over would immediately be passed on to Royals." There is

no trace of skepticism about those allegations that the state prosecutor and judge would abuse their offices.

Finally, the Weingarten Memorandum establishes that the federal prosecutors understood that a federal "favor" for Drew would "undercut" any allegation that Holmes had "corruptly let Drew's case drag on for years with no disposition." But the Weingarten Memorandum assures the reader that such evidence would not be admissible against Holmes. By exactly the same reasoning, the prosecutors ran the risk of undercutting their claim that Judge Nixon had corruptly attempted to help Drew Fairchild at Wiley Fairchild's request. Indeed, at Judge Nixon's trial, the prosecutor affirmatively misled the judge and jury by asking Drew, "Has the federal government cut you any breaks in this investigation?" and eliciting the answer, "No." Trial Tr. 202. Not until the production of the Weingarten Memorandum today has the full truth about this deception been revealed.

This revelation, in our judgment, reinforces our opposition to the impeachment resolution by emphasizing the unfairness of the investigation and trial of Judge Nixon. At this point, it is the candor of the prosecution, not of Judge Nixon, that is most seriously in question.

Very truly yours,

David O. Stewart

David Overlock Stewart

DOS/paa
Attachments

cc: Rep. William E. Dannemeyer
Rep. Michael DeWine
Rep. Charles E. Schumer
Rep. Patricia Schroeder
Rep. John Conyers, Jr.
Rep. Jim Sensenbrenner
Rep. Robert W. Kastenmeier
Alan I. Baron, Special Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

FILED
JUL 26 1988
EVVON MENDENHALL
U. S. DISTRICT COUR
E. DISTRICT OF

WALTER L. NIXON, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. H88-0052(G)

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JUL 25 1988
CLARENCE A. PIERCE, CLERK
BY ______ DEPUTY

ORDER

In its order of June 21, 1988, the Court prescribed the disclosure and production of certain evidence and information, preparatory to the hearing set for August 29, 1988. Immediately following the conference of counsel for all parties with the Court, held in St. Louis on June 29, 1988, counsel for the respondent deposited with the Court, and the Court received, under seal, in camera, and ex parte a certain document and an accompanying memorandum. At that time, the respondent requested that the Court determine whether the subject document shuld be disclosed to the petitioner in compliance with the June 21, 1988, order.

The Court has carefully considered the subject document and determines that a portion of the subject document is relevant to the issues to be taken up in the August 29, 1988, hearing and must be disclosed under subsection (i) of the June 21, 1988, order. In all other respects, the subject document is irrelevant to the hearing issues. Whereupon,

IT IS HEREBY ORDERED that respondent forthwith disclose to petitioner the following three portions of the subject document: (1) page 1: subject of document, date of document, person to whom the document was communicated, and the persons sending the document; (2) page 2: line 29 through the end of page (beginning with the first full paragraph which begins "Drew's lawyer . . ."); and (3) page 3: lines 1 and 2, ending with the word "investigation." Respondent, in its own discretion, may disclose any other portions of said document.

John F. Nangle
UNITED STATES DISTRICT JUDGE

Dated: July 29, 1988

U.S. Department of Justice

Washington, D.C. 20530

JUL 26 1988

David Overlock Stewart, Esq.
Miller, Cassidy, Larroca & Lewin
2555 M. Street, N.W.
Suite 500
Washington, D.C. 20037

Dear Mr. Stewart:

Re: United States v. Walter L. Nixon, Jr.
No. H88-0052(G)

I write in response to your letter of June 20, 1988, in which you inquire as to the existence and/or discoverability of two categories of items.

As to your number 1: The Government does not have any items which fall within this category.

As to your number 2: Pursuant to the Order issued by Judge Nangle dated July 20, 1988, I enclose a three-page prosecution memorandum dated March 22, 1985.

Sincerely,

James M. Cole
Trial Attorney
Public Integrity Section
Criminal Division

Enclosure

cc: Judge John F. Nangle

Memorandum

Subject Recommendation to Prosecute
Drew Fairchild

Date MAR 22 1985
186-41-169
JML:RHW:jev

To Gerald E. McDowell, Chief
Public Integrity Section
Criminal Division

From an Nielsen Little
eid H. Weingarten
Attorneys
Public Integrity Section
Criminal Division

I. INTRODUCTION

On February 22, 1985, the grand jury in the Southern District of Mississippi returned an indictment against Robert Royals and Robert Watkins in the Southern District of Mississippi. A copy of the prosecution memorandum for that case is attached. As explained in that memorandum, Drew Fairchild and Robert Royals were co-managers of the Hattiesburg Municipal Airport at the time of the drug arrest in August 1980. We now seek an indictment against Drew Fairchild.

II. FACTS

Drew Fairchild's role in the drug smuggling conspiracy was to make "arrangements" for the drug smugglers, including arrangements at the airport, at local hotels, at the "stash house" for the marijuana, etc. He was to share a portion of the $20,000 he was to be paid with Robert Royals, who would be present at the airport to assist in the landing and unloading of the planes. Drew is at least as culpable as Royals; he, like Royals, was present at several conspiratorial meetings with the smugglers, and was present at the airport during the preparation of planes to fly to South America. In addition, Drew did make the arrangements for the "stash house," for which he was paid $1,000.

III. PROCEDURAL POSTURE

The focus of the Mississippi investigation has been to a large extent on the handling of the Drew Fairchild drug case in the state and federal systems. The arrest occurred August 4, 1980. In November 1980, Bud Holmes, the Forrest County D.A. indirectly summoned Drew to his office and inquired as to whether he or his father, prominent Hattiesburg businessman Wiley Fairchild, "had any money." When none was forthcoming, Holmes

EXHIBIT A

directed Drew to George Phillips, the U.S. Attorney. The federal government entered into a plea agreement with Drew on November 19, 1980, wherein it was agreed that in return for Drew's cooperation and his plea to felony charges, probation would be recommended. Drew did not in fact cooperate, and by the Spring of 1981, the U.S. Attorney's office viewed his agreement as breached and intended to prosecute him. In the summer of 1981, Bud Holmes sought and received the case from the federal system back into the state system and, in August 1981, Drew Fairchild and Robert Watkins (the pilot) were indicted by the Forrest County grand jury. In January of 1982, Drew pleaded guilty to the indictment in exchange for an oral promise that the state would recommend probation. Drew's case languished in the state system for over three years (in part, we believe, due to Judge Nixon's instructing Holmes in late 1982 to go easy on Drew, this instruction made at the request of Drew's father, Wiley, who had transferred valuable mineral royalty interests to Judge Nixon). On March 8, 1985, Drew was scheduled to be sentenced. On that date the present Forrest County D.A. (and a friend and associate of Holmes) announced that he would not honor the plea agreement and that he would try Drew. A trial date has been set for May 13. Two explanations for this change of heart have been suggested: (1) that the present D.A. and judge could not withstand the public ridicule which would arise from Drew's getting probation, or (2) that the D.A. and the judge (both of whom are close friends of Holmes') have taken this action on Holmes' behalf to punish Drew for cooperating in the federal investigation of Royals (Holmes' former pilot), Nixon, and Holmes himself.

Drew's lawyer has contacted us requesting that we indict Drew federally so that he can plead guilty to a federal drug charge. Under Mississippi law "a conviction or acquittal under federal law . . . for the same act is a bar to prosecution in this state." Mississippi Code §41-29-151. Drew's lawyer is convinced that the only way for Drew to get a fair sentence is for his case to be in the federal system.

IV. ANALYSIS

Clearly we have an indictable case against Drew. The evidence against him is virtually identical to that against Royals, the testimony of the smugglers, Charles Malone and Duffy Nathan, corroborated by telephone toll records (many of which show calls from Malone to Drew's home number) plus Drew's own statements to the FBI in 1981 and to the grand jury and to us in 1984. (The former might be regarded as of a proffer and therefore inadmissible, but the latter, post-plea statements, would be admissible.)

Strategically, the decision whether to indict Drew is a difficult one. The arguments in favor of indicting him are: (1) We need the cooperation of Drew and his father, Wiley, in prosecutions of Bob Royals (presently under indictment), Bud Holmes (whom we hope to indict soon) and Judge Nixon. To the extent that indicting Drew now is desired by both Drew and his father, failure to do so could jeopardize the investigation. (2) Drew is unlikely to get a fair trial or sentence in the state system, given that both the D.A. and the judge are friendly with and, we believe, controlled by Bud Holmes. Justice would require an impartial federal forum, we believe. (3) Drew's case belongs in the federal system. The smugglers arrested at the scene were prosecuted federally, and Royals and Watkins are now being prosecuted federally. Drew was the only person connected with the bust to have a state disposition and the only one not federally prosecuted. Now that the state disposition is gone, there is no reason why his case too should not also be in the federal system. (4) It is in our interest to avoid the state trial of Drew while the Royals case is still pending. This is true because (a) a trial of Drew would involve substantially the same evidence as our prosecution of Royals, which would mean that the D.A. would likely request access to our files on Royals. Given the D.A.'s apparent sympathies with Holmes (and therefore Royals) we believe anything we agreed to turn over would immediately be passed on to Royals; and (b) a trial of Drew would involve testimony from the same witnesses we would use, the drug smugglers, and would therefore generate Jencks cross-examination material for Royals to use at his trial.

There are also valid strategical reasons not to indict Drew, however. They are: (1) Ironically, our indictment of Drew would be a "favor" to him, and it is not in our interest to appear to be helping him too much when he is our witness. To minimize this, any plea agreement we made would contain no "deals" or promises to recommend a lenient sentence, and at sentencing we would lay out the facts of Drew's smuggling involvement as well as his cooperation in as even handed a fashion possible. (2) To the extent that a prosecution of Bud would focus on his "grabbing" Drew's case, by indicting Drew we place ourselves in what looks to be the same posture by "taking" the case from the state. This presumably would never be admissible in a prosecution of Holmes, however, as the handling of Drew's case after Bud left office in 1984 is irrelevant. (3) Similarly, to the extent that we might argue in a prosecution of Holmes that he corruptly let Drew's case drag on for years with no disposition, we undercut our argument as to its impropriety when, right after the state decides to prosecute Drew vigorously, we step in and prevent it. Again, however, there does not appear to us to be any way this evidence would be admissible in a prosecution of Bud.

V. CONCLUSION

On balance we believe the investigation would be best served if Drew's case had a federal disposition at this time. Accordingly, we recommend that the attached indictment be presented to the grand jury in the Southern District of Mississippi.

Attachment

U.S. Department of Justice

RHW:JNL:ab
186-41-162

Washington, D.C. 20530

January 7, 1986

Mr. Michael S. Fawer
Fawer, Brian, Hardy & Zaczkis
700 Camp Street
New Orleans, Louisiana 70130

Re: United States v. Nixon
CR. NO. H85-00012(L)

Dear Mr. Fawer:

At our meeting on January 3, 1986, you stated that you understood that the federal government had made some sort of "deal" with Drew Fairchild prior to his federal indictment which included a resolution of his sentence in the state system. We responded that there was no federal plea bargain with Drew Fairchild, but that we would review our files to insure that there were no other favors or deals given to him. After reviewing our files we have the following information to report to you.

In 1984, Drew Fairchild began cooperating with the federal government in its investigation of the transactions between Wiley Fairchild and Judge Nixon, and in its investigation concerning the 1980 drug case. Drew's state sentence was continued several times during 1984, at his request, in part because of the federal investigation.

Drew Fairchild was scheduled to be sentenced in state court on March 8, 1985, and in contemplation of that, on March 5, I sent a letter to District Attorney Glenn White detailing Fairchild's cooperation. You have a copy of this letter.

On March 8, Fairchild's state plea agreement was vacated, Fairchild withdrew his guilty plea, and a trial date of May 13 was set for his state charges.

Shortly thereafter, Fairchild's attorney contacted us and requested that we proceed federally against Fairchild. No agreements, deals, or promises were made with this attorney.

In mid-March, we decided to seek an indictment of Drew Fairchild. While the request of Fairchild's attorney was noted, it was but one of several factors weighing into the decision to recommend an indictment. The primary factor was our belief that by March, 1985, the drug case was a federal matter that could best and most fairly be handled in Federal Court. Fairchild was indicted on March 29, and he pleaded guilty on the same day. There was no plea agreement; he pleaded guilty to the entire indictment.

Fairchild's federal sentence was scheduled for July 11, 1985. Prior thereto, Fairchild's attorneys, the District Attorney, and Judge McKenzie apparently negotiated a deal regarding Fairchild's state sentence. While Fairchild's attorneys advised us of this development, we played no part at all in this deal.

After Fairchild reported to Federal prison he filed a Rule 35 motion, which we opposed and which was denied.

I believe this will answer your questions about our negotiations with Drew Fairchild.

Sincerely,

Reid H. Weingarten
Trial Attorney
Public Integrity Section
Criminal Division

cc: Honorable James H. Meredith
Chief United States District Judge
Eastern District of Missouri

Barbara

LAW OFFICES
MILLER, CASSIDY, LARROCA & LEWIN
2555 M STREET, N. W. SUITE 500
WASHINGTON, D. C. 20037
TELEPHONE
TELECOPIER

August 5, 1988

BY HAND

Rep. Don Edwards
Chairman
Subcommittee on Civil Rights
and Civil Liberties
Committee on the Judiciary
2307 Rayburn House Office Bldg.
Washington, D.C. 20515

Dear Rep. Edwards:

I write to bring to the Subcommittee's attention a recent development concerning House Resolution 407, calling for the impeachment of Judge Walter L. Nixon, Jr. I realize that the Subcommittee has closed the record in its hearings on this matter, but I believe that the material I am enclosing with this letter is of sufficient importance that the Subcommittee should consider it. Thus, I request leave from the Subcommittee to include the enclosed Affidavit of John D. Baltar, dated August 3, 1988, in the record of the hearings for consideration by the Subcommittee in its deliberations. I would like to explain the derivation and the import of Mr. Baltar's recent affidavit.

As we have stated to the Subcommittee previously, Mr. Baltar was a very close aide of Wiley Fairchild's and was deeply involved in the negotiations and conversations between prosecutor had dictated to him. When that "proffer" is read in the context of Baltar's Affidavit, the obvious coaching and manipulation of this frightened elderly man become even more clear.

Mr. Baltar has provided further evidence that we have not had an opportunity to question Mr. Fairchild about. For example, he explains that the federal prosecutor repeatedly urged Mr. Baltar to rehearse Mr. Fairchild to give before the grand jury and at Judge Nixon's trial the testimony that the prosecutor had dictated. Baltar Aff., ¶¶ 12, 17. Similarly, Mr. Baltar recalls at least two occasions on which the federal prosecutor was told -- once by Mr. Baltar and once by Mr. Fairchild -- that Mr. Fairchild would say whatever the prosecutor wanted him to say at Judge Nixon's trial. Id. at ¶ 15.

This additional evidence, which will be presented to the District Court on August 29, further undercuts any basis for the convictions of Judge Nixon. There can be no dispute that the government twisted Wiley Fairchild into knots and then dictated his testimony. Anyone who cares about the fair administration of justice must be shocked by the government's conduct in the investigation and prosecution of Judge Nixon, and we urge the Subcommittee to give Mr. Baltar's sworn testimony the most serious consideration. Judge Nixon did not receive a fair trial. His convictions should not stand. And he should not be impeached.

Very truly yours,

David O. Stewart

David Overlock Stewart

DOS/paa

cc: Rep. Robert W. Kastenmeier
Rep. Jim Sensenbrenner
Rep. John Conyers, Jr.
Rep. Patricia Schroeder
Rep. Charles E. Schumer
Rep. Michael DeWine
Rep. William E. Dannemeyer
Alan I. Baron

STATE OF MISSISSIPPI
COUNTY OF HARRISON

AFFIDAVIT OF JOHN D. BALTAR

PERSONALLY appeared before me, the undersigned authority in and for said County and State, the within named JOHN D. BALTAR, who after being first duly sworn by me, states on his oath as follows:

1. My name is John D. Baltar and I presently reside at 400 Graymont Avenue, Jackson, Mississippi 39205.

2. In November of 1983, I became employed by W. R. Fairchild Construction Company, Ltd., of Hattiesburg, Mississippi as the Administrative Assistant to Wiley Fairchild. I remained in that position until May of this year when I left to pursue my own independent consulting interest.

3. In the early evening of Friday, April 6, 1984, Mr. Fairchild called me at home. He sounded upset and was, as usual for that time of day, inebriated. Mr. Fairchild stated that he thought he was being blackmailed by Bud Holmes over his son's drug case which was then pending in the Circuit Court of Forrest County, Mississippi. He instructed me to call George Phillips, the U.S. Attorney for the Southern District of Mississippi, and complain to him about the alleged "blackmail".

4. On Monday, April 9, 1984, I called George Phillips and asked him if he knew anything about Mr. Fairchild's son's drug case. Mr. Phillips replied he knew more about it than he wanted to know. I relayed Mr. Fairchild's complaint to Mr. Phillips and he responded he would have one of his men contact me concerning the complaint. Later that day I received a phone message from Mr. Weldon Kennedy of the FBI and I returned his call. Mr. Kennedy advised me Mr. Phillips had contacted him concerning Mr. Fairchild's

complaint and asked whether Mr. Fairchild would agree to be interviewed by the FBI the following day, April 10, 1984. I called Mr. Fairchild who stated he would agree to meet with FBI agents the following day at his office in Hattiesburg, Mississippi. Mr. Fairchild left for a vacation on April 12, 1984 and I did not have an opportunity to discuss this with him until his return several days later. At that time, Mr. Fairchild told me the FBI was interested in the oil and gas investments which Judge Walter Nixon had made with him. Mr. Fairchild stated that there was nothing to it.

5. Mr. Fairchild was subpoenaed to testify before a Special Grand Jury on July 18, 1984. I attended these proceedings with him, however, I remained outside the Grand Jury while he testified that afternoon and the following morning.

6. In early September of 1984, Mr. Fairchild was indicted by that Grand Jury on one count of giving an illegal gratuity and another for allegedly lying to the Grand Jury during his testimony. Mr. Fairchild wanted an attorney who had connections with the Federal Court and Mr. Charles B. Arendall, Jr., of Mobile, Alabama was retained because he was a former law partner to a Federal Judge in Alabama. Mr. Arendall advised Mr. Fairchild that it did not matter what his intentions were at the time he allowed Judge Nixon to invest with him, he was "guilty as hell". He told Mr. Fairchild he would probably be convicted of giving an illegal gratuity to a Federal Judge.

Since Mr. Arendall was not a criminal attorney, he advised Mr. Fairchild to hire Attorney Barry Hess of Mobile, Alabama. Mr. Hess was retained by Mr. Fairchild. At some point in time, Mr. Hess advised Mr. Fairchild that a new Federal act which would be in effect at the time of his trial would require that he begin serving his prison sentence upon conviction and would not be entitled to bail pending appeal. Mr. Hess advised him that he would probably have served his prison sentence by the time the appeal was decided.

7. In October of 1984, we had several meetings with government representatives, including Reid Weingarten, to discuss plea negotiations. Mr. Weingarten told us that Mr. Fairchild would have to provide him with a "smoking gun" against Judge Nixon in order to reach a plea bargain. During this time, Mr. Fairchild tried to think of things that were incriminating against Judge Nixon. For example, the Preacher Shows alleged pay-off scheme and the alleged murder of Bill Porter by Bud Holmes to collect on a credit life insurance policy were two attempts by Mr. Fairchild to provide Mr. Weingarten with "a smoking gun". Some of the rumors and stories Mr. Fairchild came up with during this period of time were so incredible that we had to convince him not to relate them to Mr. Weingarten.

8. Sometime in late October of 1984 we met in Jackson, Mississippi at the Ramada Inn Coliseum with Mike Martinson and Dick Morris who had conducted a poll Mr. Fairchild had commissioned to determine how potential jurors would vote in his trial. At this meeting, the pollsters advised that the potential jurors were split 50% guilty and 50% not guilty before being advised of Robert Jarvis' involvement in the case. Upon being advised of Robert Jarvis' participation, the results were 80% not guilty and 20% guilty. Mr. Fairchild wanted a guarantee that he would be found "not guilty", which the pollsters refused to give him.

9. During the ride home from Jackson, Mr. Wallace Gunn, Mr. Fairchild and I were discussing the poll results. Mr. Fairchild was concerned that the pollsters could not guarantee his aquittal and stated that, "I want to know where I will be spending Christmas". At this time, Mr. Fairchild for the

first time told us of the phone call from Bud Holmes' farm involving Judge Nixon and his meeting with Judge Nixon prior to the phone call. Mr. Fairchild said that Bud Holmes had called him and said I got a man here that wants to talk to you. After that, Judge Nixon got on the phone and said, "You know that matter we were talking about this afternoon? I am out here with that fellow and everything is going to be alright". Mr. Fairchild related Judge Nixon then stated Bud wanted to talk to him again and Bud Holmes got back on the phone and stated, "When this man asks me to do something, I do it". Mr. Fairchild then told us that this phone call followed a meeting he had with Judge Nixon at his office which he had requested. In that meeting, he told Judge Nixon he thought Bud Holmes and Carroll Ingram were trying to blackmail him by dragging his good name through the mud. When questioned further by us during the ride home, Mr. Fairchild could not remember when this meeting and phone call took place, however, he related it in time to a visit he had from Bob Royals. Mr. Royals went to Mr. Fairchild's office and stated he had been to visit Joe Crone with Bill Porter at Maxwell Air Force Base. Bill Porter had stated to Royals that Drew would not have his tail in a crack if he would get up off his money to which Royals replied, "Drew hasn't got any money". Bill Porter stated "but his old man does". Mr. Fairchild stated, "Bob, I got your message, the answer is not no, it is hell no."

10. After this conversation with Mr. Fairchild either I or one of Mr. Fairchild's attorneys called Mr. Weingarten to tell him what we had in reference to this new information. I requested that the government determine when Bob Royals visited Joe Crone with Bill Porter at Maxwell Air Force Base since this visit coincided in Mr. Fairchild's mind with the approximate date that he discussed the blackmail allegation with Judge Nixon and the phone call

was made. We were later informed by Weingarten or an FBI agent that the date of Royal and Porter's visit to Crone did not coincide with the other facts.

11. On November 1, 1984, Wallace Gunn, Wiley Fairchild and I went to Jackson, Mississippi to meet with Weingarten at the FBI office. We arrived shortly after 1:00 p.m. and Mr. Weingarten arrived sometime later. Mr. Fairchild related to Mr. Weingarten the same information he had given us in the car several days earlier. At this point, Mr. Weingarten stated to Mr. Fairchild and to us that this was "not a smoking gun". Mr. Weingarten stated in order for Mr. Fairchild to get a plea bargain, he would have to first admit the oil and gas investment with Judge Nixon was an illegal gratuity. He further stated that the evidence showed that Mr. Fairchild had entered into the oil and gas investment after Drew Fairchild's drug bust in August of 1980 and he would have to change his testimony and state that that's how it occurred.

Mr. Weingarten told Mr. Fairchild that the phone call was made before Drew Fairchild's case was passed to the files by Bud Holmes. Mr. Weingarten stated that Mr. Fairchild would have to testify that Judge Nixon had placed the phone call and that this occurred prior to the case being passed to the files in December of 1982. It was clear that if Mr. Fairchild could provide that testimony then a "plea bargain" would be possible.

After two (2) or three (3) hours of discussions and after we felt comfortable Mr. Fairchild could say the things Mr. Weingarten wanted him to say, it was agreed that we would tape Mr. Fairchild's proffer in another room. This was done after which Mr. Weingarten stated that he would let us know whether Mr. Fairchild's testimony was good enough for a "plea bargain".

Either at this meeting or in a subsequent meeting and before Mr. Fairchild's second appearance before the Grand Jury on November 28, 1984, Mr.

Fairchild also wanted an agreement from Mr. Weingarten that he would help his son, Drew, to which Mr. Weingarten responded he would do what he could to help Drew.

12. Some time after our meeting with Mr. Weingarten on November 1, 1984, Mr. Hess advised us that Mr. Weingarten had agreed to a plea bargain as I have related in my previous declaration. During that month, I had several conversations with Mr. Weingarten during which Mr. Weingarten stressed to me how important it was to keep Mr. Fairchild on track with his testimony and that he testify to important points which Mr. Weingarten had said he needed before he would agree to the plea bargain. One such occasion was at the time Mr. Fairchild entered his plea of guilty in New Orleans, Louisiana on November 26, 1984. Mr. Fairchild was to reappear before the same Grand Jury and testify as Mr. Weingarten wanted. Mr. Weingarten talked to me privately and emphasized that Mr. Fairchild should be rehearsed by me so that he would testify before the Grand Jury to the following: that Carroll Ingram first approached Mr. Fairchild about the oil and gas investment with Judge Nixon after his son Drew's drug bust in August of 1980; that the oil and gas interests which he sold Judge Nixon were worth way more than what Judge Nixon paid for them; that the meeting with Judge Nixon and Mr. Fairchild concerning the alleged blackmail by Bud Holmes took place before Drew's State drug case was passed to the files; and that the phone call from the farm that evening was placed by Judge Nixon.

I told Mr. Weingarten that I would rehearse this with Mr. Fairchild and he would be prepared for his testimony on November 28, 1984.

13. I prepared a written summary of what Mr. Fairchild would be asked by Mr. Weingarten and the answers that Mr. Weingarten wanted from Mr. Fairchild. Mr. Fairchild spent a great deal of time reviewing and rehearsing this

testimony prior to his appearance before the Grand Jury. I accompanied Mr. Fairchild to the Courthouse on November 28, 1984 for his Grand Jury appearance. After Mr. Fairchild testified, Mr. Weingarten seemed pleased with the results.

14. In the following year, FBI agents would visit Mr. Fairchild's office seeking information and copies of documents. In the Spring of 1985, Mr. Weingarten assisted Drew Fairchild as he had promised Mr. Fairchild and as I have previously related in my first declaration.

15. Sometime during 1985, Mr. Fairchild wanted to go ahead with the sentencing on his guilty plea in Federal Court. He stated he knew Mr. Weingarten did not want to sentence him until after Judge Nixon's trial so he could hold something over his head.

Mr. Fairchild instructed me to call Mr. Weingarten and tell him he would testify the way Mr. Weingarten wanted him to at Judge Nixon's trial if he got sentenced before the trial. Mr. Weingarten was hesitant, however, after Judge Nixon got indicted Mr. Weingarten agreed that the sentencing could take place. In September of 1985, we attended the sentencing hearing in New Orleans, Louisiana. Before we went into the Courtroom for the sentencing, Mr. Fairchild said to Mr. Weingarten: "Just like I told John, you don't have to worry about me, I am going to say whatever you want me to say at Judge Nixon's trial."

At the sentencing hearing, Mr. Weingarten recommended, as he had promised, that Mr. Fairchild not serve any time; however, the Court sentenced Mr. Fairchild to serve sixty (60) days in a halfway house in Jackson, Mississippi.

16. After Mr. Fairchild had served his sentence, he instructed me to call Mr. Weingarten to inquire about a pardon. I called Mr. Weingarten and he stated he would help Mr. Fairchild, but that there were certain procedures for

obtaining a pardon and explained some of those procedures. He further explained that those who made the decisions on Mr. Fairchild's pardon would come to him as prosecuting attorney for his opinion. He implied that he would have some control over whether Mr. Fairchild received a pardon. He stated that he would not help with the pardon until after Judge Nixon's trial. I related Mr. Weingarten's statements to Mr. Fairchild.

17. Several days before Judge Nixon's trial was scheduled, Mr. Weingarten called me to pick him up at the Howard Johnson's so that Mr. Fairchild, he and I could meet to prepare Mr. Fairchild for his trial testimony. It was during this meeting between the three (3) of us that Mr. Weingarten reviewed the points he wanted Mr. Fairchild to cover in his testimony which included those that he had previously had me rehearse with Mr. Fairchild prior to his Grand Jury testimony. As we covered the questions Mr. Weingarten was going to ask Mr. Fairchild on the stand, Mr. Weingarten would write the specific questions on his pad, we would then discuss the answer with Mr. Fairchild and as soon as Mr. Weingarten was comfortable that Mr. Fairchild could answer the question as Mr. Weingarten wanted, then he would write down that answer on his note pad. As we covered these questions and answers, if Mr. Weingarten did not feel comfortable that Mr. Fairchild could remember the answer or, if it seemed to confuse him, he would state that he was not going to ask that question. When Mr. Weingarten finished writing down the questions and answers, Mr. Fairchild instructed me to get the questions and answers from Mr. Weingarten's notes just like he had them to be typed for him to study before he gave his testimony. Mr. Weingarten agreed that this was a good idea and let me borrow his list of questions and answers and I copied them verbatim from his note pad and had Mr. Fairchild's secretary type them up for him to study.

A copy of these questions and answers are attached to my original declaration as Attachment 2.

During this meeting, Mr. Weingarten stated that he was relying primarily on Mr. Fairchild's testimony and that he could not rely on Mr. Jarvis because Mr. Jarvis had proven to be not credible in the past. It was very important to Mr. Weingarten that Mr. Fairchild testify that the meeting with Judge Nixon and the phone call from Bud Holmes' farm took place before Drew's case was passed to the files. Mr. Weingarten told Mr. Fairchild that when asked how he could remember that the phone call and meeting with Judge Nixon was before Drew's case was passed to the files, he was to state he remembered it because he was mad at Bud because the case had not been passed to the files as promised. Mr. Weingarten also stated that he was concerned that the defense lawyer would use the recorded conversation Mr. Fairchild had with Robert Jarvis in April of 1984 against him. He told Mr. Fairchild when asked about the Jarvis tape recorded conversation, he was to say that he was not being honest with Jarvis at that time and was telling Jarvis just what he wanted him to hear.

17. During the trial and up to the time Mr. Fairchild went on the witness stand, Mr. Fairchild studied the type written questions and answers and he and I rehearsed those questions and answers in a room at the Federal Courthouse. Several times prior to Mr. Fairchild's testimony, Mr. Weingarten checked with us and would inquire as to whether Mr. Fairchild was ready to give the prepared testimony. During these visits the typewritten questions and answers were either in Mr. Fairchild's hands or on the table or chair and in plain view of Mr. Weingarten. Mr. Weingarten appeared very nervous and concerned that Mr. Fairchild would not be able to keep his answers straight on the key points.

18. After Judge Nixon's conviction and at Mr. Fairchild's instructions, I called Mr. Weingarten to inquire about Mr. Fairchild's pardon. Mr. Weingarten replied that he would help Mr. Fairchild but he could not do so until after the Judge Nixon matter was completely concluded.

THIS THE 3rd day of August, 1988.

John D. Baltar

JOHN D. BALTAR

SWORN TO AND SUBSCRIBED BEFORE ME on this the 3rd day of August, 1988.

Janet LaFleur

NOTARY PUBLIC

My Commission Expires:

2-28-90

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September 1, 1988

BY HAND

Chairman Don Edwards
Committee on the Judiciary
Subcommittee on Civil Rights
and Civil Liberties
2307 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Edwards:

I enclose newspaper accounts of the two days of hearings this week on Judge Nixon's post-conviction motion before Judge Nangle in Jackson. The hearings unearthed extraordinary new information which the Subcommittee must consider in its deliberations on House Resolution 407:

1) Wiley Fairchild testified that he lied at Judge Nixon's trial on the following points:

(a) Whether the phone call from Bud Holmes' farm occurred before Drew Fairchild's case was passed to the files; Mr. Fairchild testified on Monday that the phone call occurred after Drew's case was passed to the files. You may recall that Judge Nixon testified that the call occurred after Drew's case was passed to the files, Carroll Ingram could not be sure when the call happened, and Bud Holmes placed the call in May 1982, seven months before Drew's case was passed to the files.

(b) Whether the approach from Carroll Ingram came before the drug bust at the Hattiesburg Airport in August 1980. Before the Subcommittee, Mr. Fairchild admitted that his trial testimony on this point was wrong.

Mr. Fairchild testified that he intentionally gave this false testimony at trial in order to please the prosecutor, Reid Weingarten. During cross-examination at the hearing this week, Mr. Fairchild said he was becoming confused by the questioning and ultimately stated that he had not given false testimony at the Nixon trial. As Judge Mangle observed with considerable understatement, Mr. Fairchild's testimony was "a bit puzzling."

2. Documentary evidence from Mr. Fairchild's files was identified and submitted into the record (and is attached to this letter as Attachment B) in Reid Weingarten's handwriting. The three sheets of paper evidently represented part of Mr. Weingarten's efforts to shape and mold Wiley Fairchild's testimony to suit Mr. Weingarten's purposes. Mr. Weingarten estimated that he reviewed Mr. Fairchild's testimony with him on eight or ten occasions. This level and extent of manipulation of a witness' testimony is highly dubious and well beyond ordinary practices of witness preparation.

3. John Baltar, Mr. Fairchild's former aide, gave devastating evidence against the government. He described in detail the occasions on which the prosecutor instructed Mr. Fairchild concerning what he should testify to in the Nixon case. Most startling, Mr. Baltar identified a second "script" that we did not know about at the time of the hearings before the Subcommittee. This second script is in the form of a chronology, and is Attachment C to this letter. The second script was prepared by Mr. Baltar, at Mr. Weingarten's direction, to rehearse Mr. Fairchild's testimony for his second grand jury appearance on November 28, 1984. Mr. Baltar testified that the entries in the left hand margins of the first and second pages of that document -- which indicate that the two key events had to occur between specific dates -- were based upon Mr. Weingarten's statements, were not based upon anything Mr. Fairchild had said by that time, and were in fact inconsistent with Mr. Fairchild's statements until that point. Mr. Weingarten admitted that he had seen this second script before Wiley testified before the grand jury and had reviewed it with Mr. Baltar. This is an extraordinary -- and fully confirmed -- additional episode of prosecutorial overreaching in this case.

4. Mr. Baltar also testified that in May of this year (1988), Wiley Fairchild directed him to ask Reid Weingarten again for help in getting an executive pardon, and that Mr. Baltar did so. Mr. Weingarten confirmed that such an approach had been made only a few months ago, but was less precise on the date. Surprisingly, neither Mr. Fairchild nor Mr. Weingarten told the Subcommittee during its hearings of this communication. Plainly, when Wiley Fairchild testified before the Subcommittee he was still hoping for help from Mr. Weingarten on a pardon.

5. A proffer was made to the Court that Rodney Fairchild, Wiley Fairchild's brother and business partner, recalls the occasion on which Judge Nixon visited the offices of Fairchild Construction Company in Hattiesburg and Wiley told

Judge Nixon about his suspicions that Bud Holmes was blackmailing him. Rodney Fairchild recalls that he left the meeting as soon as that subject came up, and that the next morning Wiley told him that he had spoken to Bud Holmes and Judge Nixon on the telephone the previous evening and everything would be all right. Most important, Rodney Fairchild recalls those events occurring after Drew Fairchild's case was passed to the files, which further corroborates Judge Nixon's recollection. We would ask for leave to proffer this evidence to the Subcommittee at this time.

Judge Nangle has set a post-hearing briefing schedule as follows: our opening brief is due on September 16, the government must respond on September 26, and any reply by us is due on September 30. By next Thursday, we hope to have a transcript of this week's hearing in Jackson, and we will forward it to the Subcommittee immediately.

In view of these developments, I urge the Subcommittee to stay its hand until Judge Nangle can rule on the pending motion. That is the course adopted this week by the Mississippi Supreme Court on the question of Judge Nixon's disbarment (see Attachment D), and is plainly the fair thing to do. We still intend to respond by September 6 to the matters raised in Mr. Baron's letter to us of August 15. Nevertheless, it is clear that the Subcommittee's hearings did not cover much relevant evidence in this case. Indeed, even the hardest heart must be moved by the spectacle of Judge Nixon sitting in jail convicted of perjury through the use of perjured testimony. The Subcommittee should not act on Resolution 407 at this time.

Very truly yours,

David O. Stewart

David Overlock Stewart

DOS/paa

Enclosure

cc: Rep. Robert W. Kastenmeier
Rep. Jim Sensenbrenner, Jr.
Rep. John Conyers, Jr.
Rep. Patricia Schroeder
Rep. Charles E. Schumer
Rep. Michael DeWine
Rep. William E. Dannemeyer
Michael B. Holleman
Judge Walter L. Nixon, Jr.

ATTACHMENT A

Feb 25, 1980 Backdoor Deal

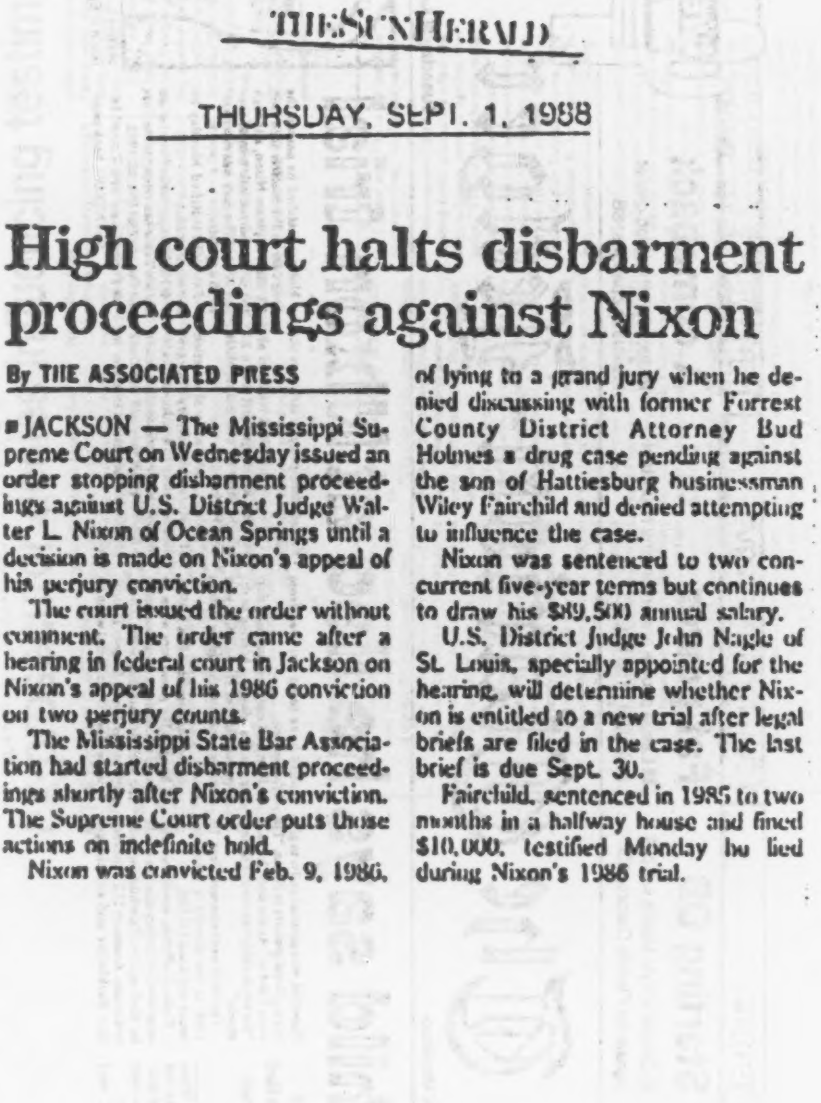
Aug 4 80 BUST

Feb 25 1981 DEEDS DRAWN

Summer 1982

Dec 29, 1982

ATTACHMENT B



THE SUN HERALD

THURSDAY, SEPT. 1, 1988

High court halts disbarment proceedings against Nixon

By THE ASSOCIATED PRESS

■ JACKSON — The Mississippi Supreme Court on Wednesday issued an order stopping disbarment proceedings against U.S. District Judge Walter L. Nixon of Ocean Springs until a decision is made on Nixon's appeal of his perjury conviction.

The court issued the order without comment. The order came after a hearing in federal court in Jackson on Nixon's appeal of his 1986 conviction on two perjury counts.

The Mississippi State Bar Association had started disbarment proceedings shortly after Nixon's conviction. The Supreme Court order puts those actions on indefinite hold.

Nixon was convicted Feb. 9, 1986, of lying to a grand jury when he denied discussing with former Forrest County District Attorney Bud Holmes a drug case pending against the son of Hattiesburg businessman Wiley Fairchild and denied attempting to influence the case.

Nixon was sentenced to two concurrent five-year terms but continues to draw his $89,500 annual salary.

U.S. District Judge John Nagle of St. Louis, specially appointed for the hearing, will determine whether Nixon is entitled to a new trial after legal briefs are filed in the case. The last brief is due Sept. 30.

Fairchild, sentenced in 1985 to two months in a halfway house and fined $10,000, testified Monday he lied during Nixon's 1986 trial.

SPORTS

Starting QB

■ Clinton's Kyle Morris will call signals for Florida Gators, 1D.

SOUTHERN STYLE

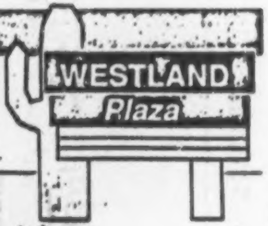
Fat power

■ Large people are organizing to protect their right to be big, 1C.

BUSINESS

A comeback

■ Jackson shopping center adjusts to changes, 8B.



The Clarion-Ledger

Metro edition ■ Jackson, Mississippi

Tuesday ■ August 30, 1986 ■ 35¢

Fairchild says he lied at Nixon trial

■ Officials won't say if perjury charges will be filed against the businessman.

By Jerry Mitchell
Clarion-Ledger Staff Writer

Hattiesburg businessman Wiley Fairchild testified Monday he lied during the 1985 federal trial of Walter L. Nixon Jr. to bolster the case against the U.S. District judge.

"I shouldn't have done it," said Fairchild, who pleaded guilty to giving an illegal gratuity to Nixon. "I'm sorry I did it." At the time, he said, "the whole thing had me in a state of shock."

Fairchild was sentenced Sept. 18, 1985, to two months in a halfway house and fined $10,000.

Federal officials would not discuss whether perjury charges would be filed against Fairchild for false testimony. Assistant U.S. Attorney Don Burkhalter said any charges would have to be pursued from Washington.

Fairchild changed his story during the first day of a hearing to determine whether Nixon's five-year perjury sentence should be thrown out.

Nixon was convicted Feb. 9, 1986, of lying to the grand jury when he denied discussing a drug case pending against Fairchild's son, Drew, with former Forest County District Attorney Bud Holmes and when he denied attempting to influence the case.

The jury acquitted Nixon of accepting an illegal gift when he bought three oil and gas royalties from Fairchild.

Holmes, indicted for obstruction of justice and perjury charges, pleaded guilty to a reduced misdemeanor charge of misconduct before a federal grand jury and was fined $10,000 and sentenced to a year in jail.

Holmes testified he passed the drug case to the inactive files Dec. 23, 1982, to please Nixon, although the judge did not ask him to take any action. The case was reactivated 33 days later.

Fairchild testified Monday he lied when he said:

■ Holmes approached him before his son's case was retired to the Forest County files Dec. 23, 1982.

■ Former state Sen. Carroll In-

See NIXON, back page

Walter L. Nixon Jr.: Serving sentence at Eglin Air Force Base.

Clarion-Ledger 8/31/88

Ex-prosecutor denies influencing testimony

■ The attorney is accused of misconduct in Judge Walter Nixon's 1986 trial.

By Jerry Mitchell
Clarion-Ledger Staff Writer

Former prosecutor Reid Weingarten on Tuesday denied claims he asked Hattiesburg businessman Wiley Fairchild to change his testimony to bolster the case against U.S. District Judge Walter L. Nixon Jr.

"I didn't instruct him on how to respond, except to tell the truth," Weingarten testified during a hearing to determine whether Nixon should be granted a new trial. The Washington attorney formerly served with the Public Integrity Division of the U.S. Department of Justice.

Although he denied influencing Fairchild's testimony, Weingarten identified an outline he wrote, possibly for preparation before Fairchild testified before a grand jury in November 1984.

Nixon sat attentively, unfolding a paper clip.

After testifying Tuesday, Michael Fawer, Nixon's attorney during the 1986 trial, accused Weingarten of prosecutorial misconduct for reportedly asking Fairchild to change his testimony.

"It was a sexy target — a federal judge," Fawer said. "Reid Weingarten bought into the idea of going after a federal judge."

If it had been known that Fairchild was lying during the 1986 trial, Fawer said, the judge would have been acquitted. "The dates were the key to the case."

Nixon was convicted Feb. 9, 1986, of lying to the grand jury when he denied discussing a drug case pending against Fairchild's son, Drew, with former Forrest County District Attorney Bud Holmes and when he denied attempting to influence the case.

See NIXON, back page

■ Nixon lived in secret, 12A

Nixon

Nixon, sentenced to two concurrent five-year terms, continues to draw his $89,500 annual salary.

The jury acquitted Nixon of accepting an illegal gift when he bought three oil and gas royalties from the elder Fairchild.

U.S. District Judge John Nangle of St. Louis, specially appointed for the hearing, will determine whether Nixon is entitled to a new trial after legal briefs are filed in the case. The last is due Sept. 30.

Fairchild, sentenced in 1986 to two months in a halfway house and fined $10,000, testified Monday he lied during Nixon's 1986 trial when he said:

■ Holmes approached him before his son's case was retired to the Forrest County files Dec. 23, 1982.

■ Former state Sen. Carroll Ingram of Hattiesburg approached him about the royalties with Nixon after the August 1980 drug bust in which Fairchild's son was arrested.

Fairchild said Monday that Holmes approached him after the case was retired and Ingram approached him before the bust.

Holmes, indicted for obstruction of justice and perjury charges

Fairchild's testimony is immaterial.

"The date of the phone call (from Holmes) has no significance," Cole said. "The (perjury) convictions ... were solely based on Bud Holmes' testimony."

Weingarten testified the dates "only became an issue at the trial. Crucial association did not become a significant point until Judge Nixon's trial."

The former prosecutor appraised Fairchild's performance as a witness in Nixon's trial.

"You could never be sure what he would testify to" five minutes after being questioned, he said. "In some respects, he couldn't have done better. On the fundamental points, he held firm."

Nangle asked Weingarten, "Was Wiley Fairchild the kind of witness whether he was testifying for Mr. Weingarten or Mr. (David) Stewart or attorney A or B that he'd create a heart attack for a lawyer?"

"Yes, sir, I learned that at Judge Nixon's trial," Weingarten replied.

"That about right, Mr. Stewart?" Nangle asked.

"I'm not sure I'm in the position to answer that," replied Stewart, another of Nixon's attorneys.

Holleman said the outcome of the hearing could ultimately affect the impeachment process against the judge. "The only thing he went up to Congress on was his conviction."

Proposed impeachment proceedings against Nixon are pending before the House Civil and Constitutional Rights Subcommittee. The subcommittee heard testimony in July, including testimony from Nixon.

House Judiciary Committee officials who attended Tuesday's hearing would not comment on how court proceedings might affect the impeachment process.

If a majority of House members favors impeachment, the case would go before the Senate for trial. A two-thirds Senate vote is required to impeach a judge.

The case against Nixon hinges solely on a conviction based on his voluntary 1984 appearance before a grand jury, Holleman said. "If Judge Nixon hadn't done that, he wouldn't be here."

testimony

I INTRODUCTION

II DREW'S CASE

A BUST

B DREW goes to ~~BUD~~ George Phillips

C. While BUD HAS CASE

DELAY

PUBLICITY

efforts to get $ — Porter — Roya — Dre,

ALL This: ANGER

D Do what? Call NIXON

Why? OWED A FAVOR

I LEASES:

A. DESCRIBE DEAL

B. DOCUMENTS MANIPULATED

C. VALUE

D. PROSECUTED FOR THIS;

GRATUITY

PERJURY TO BE DISMISSED

SENTENCING NEXT MONTH

DEAL ON SENTENCE

IV CALL & VISIT

Did you tell anybody about call?

IV McKenzie visit

ATTACHMENT C

PAGE 1

August 4th 1980 - Airport Drug Bust

Between these Two Dates: (Wiley Contacted By Carroll Ingram to put Judge Nixon in Oil Deal.)

November 19th 1980 - Plea Bargain - Drew & U.S. Att

February 26th 1981 - Wiley Signed 3 Oil Deeds to Judge Nixon.

August 26th 1981 - Drew Indicted by Mississi
Wiley Called by Bud Holmes to Hire Bill Porter.

January 12th 1982 - Drew given 2 minutes to Plead Guilty

EXHIBIT
15
PETITIONER'S

PAGE 2

OCTOBER 12th 1982 - Pilot WATKINS PICKED UP IN FLORIDA - THIS IS 2nd TIME Pilot HAS BEEN PICKED UP.

Between these TWO DATES

Visit from BOB Royals After HE AND Bill PORTER HAD Been to MAXWELL AIR FORCE BASE to Visit JOE KROHN.

Wiley CALLED CARROll INGRAM to HAVE JUDGE NIXON Visit Him AND CARROll Brought JUDG out to Wileys Office.

[Wiley Received CALL from JUDGE NIXON AND BUD Holmes About 7:20 p.m.

DECEMBER 23RD 1982 - ON motion of District Attorn Office JUDGE WELDY PASSED Drew's CASE to the Files.

PAGE 3

JANUARY 26th 1983 - Motion by BUD Holmes t
Re-instate Drew's CASE.
JUDGE DICKIE McKENZIE
ORDered Drew's CASE Re-instat

JANUARY 26th 1983 - PiloT WATKINS: ENTERED
Plea of Not Guilty AND WA
Released on $100,000 BOND

NOVEMBER 4th 1983 - Bill PORTER Missing

April 6th 1984 - DREW'S CASE Brought up
AGAIN By JUDGE McKENZIE.
Wiley CALLED JOHN BALTAR
to TALK to GEORGE Phillips.

PAGE 4

July 18th 1984 - Wiley testified Before GRAND JURY. DREW HAS Still Not Been Sentenced. AND JUDGE NIXON still ON BENCH. Wiley is still Subject to Power of Forre County JUDGE, District Atto AND JUDGE NIXON. Wiley is SCARED for SON.

Septembr 6th 1984 - Wiley INDICTED

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September 6, 1988

By HAND

Alan I. Baron
Special Counsel
Committee on the Judiciary
House Annex 2, Room 366
Washington, D.C. 20515

Dear Mr. Baron:

I enclose our Supplemental Post-Hearing Memorandum, which responds to the specific questions raised in your letter of August 15, 1988. We appreciate the opportunity to respond to the Subcommittee's concerns, and are confident that all of Judge Nixon's statements identified in your letter were truthful.

I also wish to repeat the request in my letter of September 1 to Chairman Edwards, that the Subcommittee not act on House Resolution 407 until Judge Nangle rules on our motion to vacate Judge Nixon's convictions. The revelations at the hearing in Jackson last week were extraordinary. I think the Subcommittee will recognize that the prosecutorial overreaching in the prosecution of Judge Nixon was extreme, and completely overwhelmed Wiley Fairchild. We already have explained to the Subcommittee that Bud Holmes is a witness with extremely limited credibility. Wiley Fairchild, it turns out, was intentionally lying at Judge Nixon's trial and before this Subcommittee. There are no other witnesses against Judge Nixon.

As soon as it is available, we will provide the Subcommittee with a copy of the transcript of last week's hearing, and also will send to the Subcommittee our brief to the District Court (due on September 16), the government's response (due on September 26), and our reply brief (due on September

30). In all of these circumstances, the Subcommittee should stay its hand until Judge Mangle can rule on the pending motion to vacate the conviction.

Very truly yours,

David Overlock Stewart

DOS/paa

cc:
- Chairman Don Edwards
- Rep. Robert W. Kastenmeier
- Rep. Jim Sensenbrenner, Jr.
- Rep. John Conyers, Jr.
- Rep. Patricia Schroeder
- Rep. Charles E. Schumer
- Rep. Michael DeWine
- Rep. William E. Dannemeyer
- Michael B. Holleman, Esq.

SUPPLEMENTAL POST-HEARING MEMORANDUM OPPOSING HOUSE RESOLUTION 407 CONCERNING THE IMPEACHMENT OF DISTRICT COURT JUDGE WALTER L. NIXON, JR.

Submitted To The Subcommittee
On Civil And Constitutional Rights
And Liberties Of The House Judiciary
Committee On Behalf Of Judge Walter L. Nixon, Jr.

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September 6, 1988

By letter dated August 15, 1988, the Subcommittee has invited us to address whether Judge Nixon spoke truthfully at several specific points during a taped interview on April 19, 1984, and whether Judge Nixon testified truthfully at page 56 of the transcript of his grand jury testimony on July 18, 1984. We appreciate the opportunity to address these matters. Because the current record fully demonstrates that Judge Nixon's responses on both occasions were truthful, we do not submit any additional evidentiary material. [1]

As former prosecutor Weingarten has testified, the truth of Judge Nixon's statements must be measured against his "understanding [of] the parameters of the investigation" and the meaning of the questions Mr. Weingarten was asking. Tr. 6/9/88, p. 101. In order to evaluate fairly Judge Nixon's understanding of the prosecutor's questions, the Members of this Subcommittee must place themselves in Judge Nixon's position during April and July, 1984. The first part of this Supplemental Memorandum will review briefly the context in which Judge Nixon spoke in early 1984; the second part will demonstrate the truthfulness of each of the six passages identified by the Subcommittee.

---

[1] We submitted by letter to Chairman Edwards dated September 1, 1988, certain documentary records which first came to light last week during the hearing on Judge Nixon's motion to vacate his convictions. That hearing revealed extraordinary further evidence of prosecutorial overreaching in the prosecution of Judge Nixon, some of which was related in our September 1 letter. We expect to provide the Subcommittee with a transcript of that hearing this week, along with copies of our brief to the District Court when it is prepared (it is due on September 16). We again would urge this Subcommittee not to act on House Resolution 407 until the District Court has an opportunity to rule on Judge Nixon's pending motion.

1. The Context

On April 19, 1984, Judge Nixon received a telephone call informing him that a man from the Justice Department in Washington wanted to meet with him on unspecified business. Tr. 7/12/88, p. 64. Id. Later that day, Mr. Weingarten and Agent White-Spunner arrived at Judge Nixon's chambers and were buzzed in to see him. Id. Subcommittee Exhibit 22 is a transcription of the interview that followed, but the transcript begins only when Mr. Weingarten starts the formal interview. Prior to that time, the three exchanged greetings, and Mr. Weingarten informed Judge Nixon of the purpose of his visit. Mr. Weingarten said "something to the effect that they were down looking into the question of an investment that [Judge Nixon] had made with Mr. Wiley Fairchild, which they thought was possibly an imbalanced investment in oil and gas, and the handling of his son's drug-smuggling case at the Federal level in Mississippi. And whether there was any connection between the two." Tr. 7/12/88, pp. 65-66 (testimony of Judge Nixon). See also Tr. 6/9/88, pp. 88-89 (testimony of Reid Weingarten).

Thus, when the interview began, Judge Nixon had no reason to think that Mr. Weingarten or Agent White-Spunner were interested in Wiley Fairchild's baseless allegation of blackmail by Bud Holmes. Not only was that allegation unrelated to the federal handling of Drew's case, but it was an allegation that, to Judge Nixon's knowledge, had long been resolved because it had no foundation. On the same day that Wiley confided his blackmail concerns to Judge Nixon, Judge Nixon mentioned them to Bud Holmes

Nixon

gram of Hattiesburg approached him about the oil and gas investment with Nixon after the August 1980 drug bust in which Fairchild's son was arrested.

Fairchild said Monday that Holmes approached him after the case was retired and that Ingram approached him before the drug bust.

As to the reason behind what he did, Fairchild said he wanted to please prosecutor Reid Weingarten. "I wanted to do what Mr. Weingarten wanted me to do as long as it was something I could live with."

Admitting he had a poor memory, Fairchild said he was not instructed by Weingarten to lie.

Asked by James M. Cole, trial attorney for the Public Integrity Division of the U.S. Department of Justice, if he had intentionally lied at the trial, Fairchild replied, "I was led to believe it was all right."

When Cole asked if Fairchild knew it wasn't true when he said it, Fairchild replied, "Yes."

But Fairchild contradicted himself under cross-examination.

"You thought you were telling the truth at the time?" Cole asked.

"Yes," Fairchild replied.

After a debate between attorneys as to what Fairchild meant, U.S. District Judge John Nangle of St. Louis said, "The picture of Mr. Fairchild's testimony is a bit puzzling."

The investigation and charges against Nixon grew out of allegations Nixon attempted to influence the drug smuggling charge against Drew Fairchild in Forrest County Circuit Court. Late in Nixon's 1986 trial, federal prosecutors conceded there was no link between the drug case and an oil and gas deal between Nixon and Wiley Fairchild.

John Baltar, who worked as a consultant and troubleshooter for Fairchild in his Hattiesburg construction company, testified he helped Fairchild prepare to testify both before a federal grand jury and in Nixon's trial.

Fairchild had in his pocket a typed list of questions Weingarten was to ask and a list of corresponding answers when he testified at Nixon's trial in Hattiesburg in February 1986, Baltar said.

"It was very important to Mr. Weingarten that Mr. Fairchild testify that the meeting with Judge Nixon and the phone call from Hud Holmes' farm took place before Drew's case was passed to the files," Baltar said.

Fairchild changed his story to conform with what Weingarten told him, Baltar said.

When Nangle asked if there was any suggestion by Weingarten for Fairchild to say something false, Baltar replied no.

Testimony is slated to continue at 9:30 p.m. in federal court, and the hearing is expected to last at least through today.

Nixon, who attended the hearing Monday, is serving his sentence at the federal prison Eglin Air Force Base near Pensacola, Fla. He continues to draw his $89,500 annual salary.

and then was told over the telephone by Wiley that "I am satisfied." Tr. 7/12/88, p. 57. Thus, more than a year before the April interview, Wiley apparently had acknowledged the baselessness of his allegation. Judge Nixon had heard nothing more about the subject by mid-1984. Tr. 7/12/88, pp. 81-82, 220. See id. at 60-61 (Judge Nixon did not relate blackmail accusation to Carroll Ingram because it was nonsense and Wiley was no longer troubled).

Moreover, Mr. Weingarten said nothing to prompt Judge Nixon to dredge up this dead charge. To the contrary, everything that Mr. Weingarten said during the April 19th meeting reinforced Judge Nixon's understanding that the investigation was about the federal handling of Drew's case. And even when Judge Nixon mentioned some recall of news accounts relating to Drew's case, Mr. Weingarten simply attempted to pin down that the news articles related to the state proceedings, and then addressed a new matter, conveying the message that the news stories -- and the state proceedings -- were of no interest to him. See Ex. 22 at 19, 31-32.

Finally, Mr. Weingarten's very presence confirmed Judge Nixon's reasonable view that this federal inquiry related to the federal handling of Drew's case. Mr. Weingarten quickly identified himself as a Justice Department lawyer who prosecuted congressmen, Ex. 22 at 10, thus, a lawyer from the Public Integrity Section. The Public Integrity Section would have no jurisdiction to investigate simple allegations of blackmail by a state official. 2/

Between this April interview and the July grand jury appearance, Judge Nixon's frame of reference for answering Mr. Weingarten's questions did not change; rather, the media confirmed that Mr. Weingarten was investigating official misconduct by Judge Nixon. In a barrage of news reports, Judge Nixon was accused of improperly receiving mineral interests from Wiley, and was reportedly headed for indictment on charges of bribery. Tr. 7/12/88, p. 84. The frequent news reports acutely focused Judge Nixon's attention on the bribery allegations. Because Judge Nixon knew he could not be accused of a gratuities-type crime for actions not taken in his official capacity, these news reports confirmed Judge Nixon's belief that Mr. Weingarten was investigating the federal handling of Drew's case. 3/

2/ Judge Nixon also knew that Mr. Weingarten could only be concerned with his investment with Wiley if the investigation was concerned with federal mishandling of Drew's case. To violate the gratuities statute, a judge must take an "official act." As Judge Nixon explained before the grand jury, a federal judge cannot officially interfere in a state action. See Ex. 23 at 48-49.

3/ And in fact, Mr. Weingarten was -- in mid-1984 -- investigating only Judge Nixon's involvement, if any, in the federal handling of Drew's case. See generally Memorandum Concerning The Truthfulness Of Judge Nixon's Grand Jury Testimony Of July 18, 1984, Submitted To The Subcommittee On Civil And Constitutional Rights And Liberties Of The House Judiciary Committee On Behalf Of Judge Walter L. Nixon, Jr., June 7, 1988 at 16-20. Judge Nixon cannot be faulted for understanding Mr. Weingarten's questions to be inquiring into his involvement with the federal handling of Drew's case when Mr. Weingarten, himself, intended those questions to be so understood.

2. Judge Nixon Truthfully Answered The Questions Posed In The April 19, 1984 Interview

The Subcommittee has requested comments on five exchanges that took place during the April 19, 1984 meeting. Judge Nixon's remarks in each exchange were truthful.

a. "Did he have anything" through "a darn thing to do with it," pp. 19-20.

In this dialogue, Judge Nixon was asked if Wiley expected any special favors from Judge Nixon in return for selling him oil and gas interests. Judge Nixon, explicitly tying his answer to the scope of Mr. Weingarten's investigation, explained that he did not ever understand Wiley to have asked for any special favors regarding his son's case. Judge Nixon's answer was true. As he explained to this Subcommittee:

> Mr. Stewart: . . . Now, were those accurate statements by you?
>
> Judge Nixon: Yes. Absolutely.
>
> Mr. Stewart: And why did you consider those accurate statements?
>
> Judge Nixon: Because I had nothing to do with it, whatsoever. I knew they were investigating--as far as I was concerned--any official act that had [been] performed, and I assumed that it was addressed to the handling of it on the Federal level because that's the only level on which I could have performed any kind of official act.

Tr. 7/12/88, pp. 71-72.

And, in fact, all the evidence before this Subcommittee indicates that the only quid pro quo for the oil and gas interests sold to Judge Nixon was the $9,500, plus interest, that Judge Nixon paid to Wiley Fairchild. Both Wiley and Judge Nixon testified that the transaction was arms-length. Tr. 7/6/88, pp.

34-35, 54-55, 63-64; Tr. 7/7/88, p. 14 (testimony of Wiley Fairchild); Tr. 7/12/88, pp. 19-23 (testimony of Judge Nixon). Further, Wiley testified that he did not do business with Judge Nixon in order to obtain special favors. Tr. 7/6/88, pp. 37-38, 110-11; Tr. 7/7/88, pp. 10-11, 54. Finally, Judge Nixon and Wiley agree that Wiley never asked Judge Nixon for a special favor. Tr. 7/6/88, pp. 86-87, 101-102, 116-17; Tr. 7/7/88, pp. 5-6, 44-45 (testimony of Wiley Fairchild); Tr. 7/12/88, pp. 48-49 (testimony of Judge Nixon). See also Tr. 6/9/88, p. 106 (testimony of Reid Weingarten).

In questioning at the July 12th hearing, special counsel suggested a convoluted reading of Mr. Weingarten's question on page 20 whether Judge Nixon "detected anything untoward . . . . Tr. 7/12/88, p. 216. Special counsel implied (i) that Mr. Weingarten had asked whether Judge Nixon knew of anything at all untoward during Judge Nixon's entire relationship with Wiley, and then, (ii) that Wiley's allegation of blackmail by Bud Holmes was an "untoward" activity. But Mr. Weingarten did not ask Judge Nixon whether anything untoward had been mentioned in the world at large or by Mr. Fairchild at any time. Rather, Judge Nixon interrupted Mr. Weingarten in the middle of that question because he understood Mr. Weingarten to be asking, consistent with the preceding exchange, whether Wiley had been seeking to obtain special, or otherwise untoward, favors from a federal judge. That truthful answer to that question was no.

b. "From the time of the bust" through "Absolutely no," pp. 31-33.

In this exchange, Judge Nixon was first asked whether he had any connection with "the DREW FAIRCHILD case" "from the time of that bust until ba-basically [now]." Judge Nixon replied to this broad, general question that he had no connection with Drew's case, but that he had read something about it in the press. On further questioning, Judge Nixon recalled that the press reports related to the State's handling of Drew, and Mr. Weingarten then changed the course of questioning to whether Judge Nixon discussed Drew's case with Wiley while he was "dealing with WILEY." Judge Nixon denied any discussions about Drew during that time period. Before the Subcommittee, Judge Nixon explained for both segments of his exchange with Mr. Weingarten.

With respect to the first, more general question, Judge Nixon explained that he understood Mr. Weingarten to be referring to the federal handling of Drew's case:

> Mr. Stewart: At page 31 of that transcript, the question is asked: "You've had no connection, no knowledge of it, no participation in the Drew Fairchild case?" And you responded, "Absolutely, except something I read in the paper."
>
> Do you consider that, even today, to be an absolutely accurate statement?
>
> Judge Nixon: Yes. I do, for the reasons previously stated. See, Mr. Weingarten kept coming back to why the case wasn't prosecuted in Federal court, and asked me about whether the U.S. Attorney or his assistant had been involved in any way, or talked to me about the case, and interested in how it was, quote, "steered" from Federal to State court. And of course I knew in addition to that--I thought

> that was the focus of his investigation, certainly as it related to me plus the fact that I knew what the law was with respect to a gratuity violation.
>
> It had to be an official act by a Federal judge to constitute such.

Tr. 7/12/88, pp. 73-74. And of course, it has never been suggested by anyone that Judge Nixon knew anything about the federal treatment of Drew Fairchild. Judge Nixon reasonably did not associate Wiley's blackmail allegation with the prosecutor's question about Drew's case.

With respect to Mr. Weingarten's second series of questions, Judge Nixon explained to this Subcommittee that in 1981, at the time he finalized his oil and gas dealings with Wiley, that Drew had never been mentioned by Wiley:

> Ms. Naughton: All right. Is it your testimony, then, Judge Nixon, that your answer, "Not to my recollection, I think I would recall that," was accurate because Wiley mentioned Drew's case to you at a time at which you were not dealing with him?
>
> Judge Nixon: Yes.

Tr. 7/12/88, p. 212. Indeed, Judge Nixon never even knew that Wiley Fairchild had a son named Drew until much later. Trial Tr. 2/5/86, pp. 1524-25.

c. First Paragraph, p. 37

In this passage, Judge Nixon volunteered to Mr. Weingarten that he would not have invested with Wiley if anyone had suggested that he would be asked to assist Drew in any way. Further, he stated that he never was asked to do anything, and he never did anything, for Drew. The passage is entirely true.

First, no one has ever implied that Judge Nixon was involved in any conversation relating to Drew Fairchild, or any aspect of his legal problems, other than the the two exchanges on the day when Wiley's blackmail allegation came up. These two conversations, however, took place long after Judge Nixon's oil and gas deal with Wiley was formally recorded in early 1981. The earliest estimate of the date of these two conversations (by Bud Holmes) is May 14, 1982. Thus, even if Judge Nixon had been asked to assist Drew, it could only have been after the investment was completed.

Second, there is no evidence that Judge Nixon was asked to assist Drew at the federal level, or that he did anything in order to assist Drew. Because Judge Nixon understood the investigation to relate to the federal handling of Drew's case, his volunteered statement plainly referred only to Drew's case at the federal level. But the two blackmail conversations took place after Drew had been indicted in state court. Thus, they cannot form any basis for charging Judge Nixon with having been asked to aid, or having aided, Drew's case in federal court.

And third, in any event, Judge Nixon was not asked to assist Drew in his state case, and did not do so. Judge Nixon recalled that the two blackmail conversations did not occur until 1983, by which time Drew's case already had gone to the inactive file and had been returned. This dating was confirmed by Wiley Fairchild at the court hearing in Jackson on August 29 of this year, and by the proffered testimony of Rodney Fairchild. See Letter to Chairman Edwards from David O. Stewart (Sept. 1, 1988). This dating also is consistent with the testimony of Carroll Ingram. 4/ Thus, Judge Nixon could not have aided Drew, despite the prosecutor's contentions to the contrary, by inducing Holmes to pass Drew's case to the files.

Even if the blackmail conversations took place in May 1982, as Bud Holmes has contended, Judge Nixon's statement was correct. Wiley has testified that he did not ask Judge Nixon to do anything at all for him. And in fact, Wiley testified that he did not want special treatment for Drew at all; rather, he just did not want his son's co-conspirator to get off. Tr. 7/6/88, pp. 86-89; Tr. 7/7/88, pp. 5-6, 42-43. See also Tr. 6/9/88, p. 106. Similarly, Judge Nixon took no action to assist Drew. Judge Nixon simply relayed to Bud Holmes the blackmail allegation made by Wiley. Holmes responded that Drew's case already was resolved. Holmes admits that Judge Nixon made no attempt to influence the state prosecution. And indeed, because Drew's case was not passed to the file until seven months after the alleged May conversation between Judge Nixon and Holmes, it is highly improbable that Judge Nixon could have influenced Holmes to pass Drew's case to the files.

d. Last Paragraph, p. 43

During an explanation by Mr. Weingarten that the investigation related to why federal charges against Drew were not pursued, Judge Nixon interrupted to state that he was

---

4/ The only witness who unequivocally places the phone call before Drew's case was passed to the inactive files is Bud Holmes. We have previously discussed at length the problem of Mr. Holmes' credibility. See Post-Hearing Memorandum, pp. 38-57.

"puzzled," and, in the final paragraph on p. 43 of the transcript, excuses his puzzlement by explaining that he never had heard "about the case." Mr. Weingarten and Judge Nixon clearly were both talking about the federal treatment of Drew, not the state case brought against Drew.

Immediately after stating that he had not heard about the case, Judge Nixon joked that he doubted he could have influenced Judge Cox, the federal district judge who Judge Nixon thought had handled Drew's case. Mr. Weingarten clarified that Judge Cox never had Drew's case because Drew was not federally indicted, but did not then ask whether Judge Nixon could have influenced anyone involved in the state proceedings. Significantly, once Mr. Weingarten clarified that Drew was not federally indicted, Judge Nixon qualified his earlier discussion, noting "That's [federal treatment of Drew is] what I'm talking about." Ex. 22 at 44.

e. "I understand, but regardless" through "Oh, no," pp. 47-48.

In this passage, Judge Nixon explained that he took no action as a federal judge to influence Drew's case, and that Bud Holmes did not speak with Judge Nixon about the federal case against Drew.

Immediately before the passage noted by the Subcommittee, Mr. Weingarten explained to Judge Nixon the significance of when the oil and gas investment occurred. Mr. Weingarten noted that because Drew's drug bust took place in late 1980, unless the investment took place after that time, it could not have been designed to purchase Judge Nixon's aid. Mr.

Weingarten was again directing Judge Nixon's attention to the federal prosecution. Drew Fairchild was not indicted in state court until August 1981. Because there is no doubt that the oil investment was finalized in early 1981, it surely was concluded before the state prosecution began. Thus, if Mr. Weingarten was inquiring about Judge Nixon's assistance in the state prosecution, whether the investment took place in early 1980 or early 1981 would be irrelevant because the state prosecution did not yet exist at either time.

Judge Nixon, too, certainly focused on the federal prosecution. Recognizing that there could be no impropriety without official action on his part, Judge Nixon asked "but regardless, what . . . [c]ould I have conceivably done . . . [t]o influence the case . . . [a]s United States District Judge." Ex. 22 at 47-48. Judge Nixon's confusion was entirely reasonable; to this day no one has suggested that Judge Nixon took an official act to help Drew Fairchild. Mr. Weingarten's next statement did not urge Judge Nixon to consider unofficial actions he might have taken in the state prosecution of Drew but, to the contrary, maintained the focus on federal action by suggesting that "things" might be imagined. Id. at 48. And then, in the same sentence, Mr. Weingarten asked if Bud Holmes spoke with Judge Nixon about "the case." Judge Nixon, understanding "the case" to refer to the federal case against Drew, truthfully answered no.

3. Judge Nixon Truthfully Answered The Questions Posed In His July 18, 1984 Grand Jury Testimony

The Subcommittee has asked us to address Judge Nixon's testimony at lines 3-20 of page 56 of the grand jury transcript. Taken entirely out of context, this testimony might be read to indicate that Judge Nixon could not recall any reason that he might have met with Wiley after the investment was completed in 1981. But when read in context, it is clear that Mr. Weingarten's question referred only to meetings with Wiley Fairchild at which oil and gas interests were discussed; and it is apparent from Judge Nixon's answer that he understood Mr. Weingarten's question to refer solely to such meetings. The meeting at which Wiley alleged blackmail by Bud Holmes was not a meeting at which oil and gas investments were discussed, but was a meeting about blackmail. See Tr. 6/9/88, p. 106 (testimony of Reid Weingarten); Tr. 7/7/88, p. 5 (testimony of Wiley Fairchild); Tr. 7/12/88, pp. 48-49 (testimony of Judge Nixon).

Nearly the entire grand jury transcript until this passage at page 56 concerns Judge Nixon's investment with Wiley. See Ex. 23 at 5-44. Judge Nixon reasonably focused on that investment in his testimony. In a line of questioning beginning at page 53, Mr. Weingarten asked if Judge Nixon had met alone with Wiley Fairchild. Judge Nixon explained that he met with Wiley "More than once, discussing the gas interests." Ex. 23 at 53 (emphasis added). Mr. Weingarten then asked whether Carroll Ingram would have been present "on those occasions." Id. (emphasis added). And again, the very next question is whether "any of those meetings" took place in 1981. Id. (emphasis added). Both Judge Nixon and Mr. Weingarten indisputably were talking about meetings to discuss the gas interests. Several moments later, and in response to Mr. Weingarten's very next question, Judge Nixon observed that he "talked with him [Wiley Fairchild] on the phone . . . a couple of times about this [the oil and gas interests]. And especially one time, when the production dropped in half." Id. at 54.

At pages 55 and 56, Mr. Weingarten maintained this focus on oil and gas meetings, noting that he could understand how there could have been a first meeting to "cut" the oil and gas deal, and a second meeting at the effective date of the deal, but he did not understand for what purpose any other meetings might have taken place. Id. at 55-56. Judge Nixon, still associating Mr. Weingarten's inquiries to oil and gas meetings, responds that at one meeting, Wiley discussed the fact that he may have overcharged Judge Nixon on the three wells, and that Wiley might suggest another investment with Judge Nixon in the future. Id. at 56. Judge Nixon stated that otherwise, he, too, could not think of other reasons he may have met with Wiley about the oil and gas investment. Mr. Weingarten then summed up this portion of the examination of Judge Nixon, referring solely to the timing and completion of the oil and gas investments. Id. at 57-58.

Throughout this exchange, both men were discussing Judge Nixon's oil and gas investment, which was the subject of the grand jury investigation, and not Judge Nixon's brief confrontation with Wiley's allegation of blackmail by Holmes. Judge Nixon did not mention the blackmail meeting because it was irrelevant to both the grand jury inquiry and to Mr. Weingarten's questions. And Judge Nixon has explained to the Subcommittee that he thought that volunteering Wiley's blackmail allegation would have been irresponsible, in view of his belief that the allegation had been totally unfounded. Tr. 7/12/88, pp. 82-83.

CONCLUSION

In reviewing Judge Nixon's conduct, it is crucial that the Subcommittee recognize that he did not know of any reason why he should volunteer an old allegation of blackmail that Wiley, himself, had told him was unfounded, and which did not involve any hint of wrongdoing by Judge Nixon. This Subcommittee should conclude, as the prosecutors and grand jury also did, that Judge Nixon's responses in the exchanges discussed above were truthful.

Respectfully submitted,

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January 27, 1989

By HAND

Rep. Don Edwards
Chairman
Subcommittee on Civil and
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House Judiciary Committee
2307 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Edwards:

In response to your letter dated January 9, 1989, I am enclosing a Memorandum addressing the issues raised, along with sworn statements of Judge Nixon, George Morse, Esq., and Joe Sam Owen, Esq.

I also must confess that the effort in responding to your January 9 letter has delayed our production of the memorandum I have previously promised commenting on Judge Nangle's opinion. We will continue to try to work on that.

Very truly yours,

David O. Stewart

David Overlock Stewart

DOS/paa

cc w/encl: Rep. Robert W. Kastenmeier
Rep. Jim Sensenbrenner, Jr.
Rep. John Conyers, Jr.
Rep. Patricia Schroeder
Rep. Charles E. Schumer
Rep. Michael DeWine
Rep. William E. Dannemeyer
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MEMORANDUM IN RESPONSE TO LETTER OF JANUARY 9, 1989

TABLE OF CONTENTS

Page

I. FACTUAL BACKGROUND....................................4

A. Boam Company Case....................................4

B. The Seymour Case....................................8

II. DISCUSSION 13

A. Disqualification Under Sec. 455 and the Code of Judicial Conduct....................................14

1. Judge Nixon Had No Financial Interest In Either Lawsuit....................................14

2. Recusal Was Not Required To Avoid The Appearance Of Impropriety....................................17

a. The Legal Standard....................................18

b. Recusal Was Not Required Under Sec. 455(a) In The Boam Company Case....................................20

c. Recusal Was Not Required Under Sec. 455(a) In The Seymour Litigation....................................21

B. The Two Civil Cases Do Not Establish Any Gratuity Offense....................................28

C. Judge Nixon's Failure To Recuse Himself Is Not An Impeachable Offense....................................32

D. The Two Civil Cases Have No Significance For This Proceeding....................................36

CONCLUSION....................................39

MEMORANDUM IN RESPONSE TO LETTER OF JANUARY 9, 1989

In a letter dated January 9, 1989, Chairman Edwards has invited comment concerning two civil cases that were pending in Judge Nixon's court in the late 1970s and early 1980s, in which W. R. Fairchild Construction Co. was a party. In particular, the letter raises four questions concerning the two cases: The Boam Company, et al. v. Dependable Insurance Company, et al., Case No. S77-0385(N) and Jack N. Seymour, Jr. v. L & A Contracting Co., et al., Case No. S80-0274(N).

1. The propriety of Judge Nixon's involvement in these two civil cases under the judicial canons and 28 U.S.C. § 455.
2. Whether Judge Nixon's rulings in these cases could be "official acts" for purposes of establishing an illegal gratuity.
3. Whether a judge's failure to recuse himself in the presence of a conflict of interest is an impeachable offense.
4. The significance of these two civil cases in light of the other evidence in the case.

We appreciate the opportunity to respond, particularly because we are concerned that the Subcommittee appears to have received a remarkably incomplete and possibly misleading report on the facts involved. When the Subcommittee understands the complete facts surrounding the two civil cases, we are confident that the Subcommittee will agree that they provide no basis for action against Judge Nixon. Far from reflecting some sinister arrangement to buy justice, the full record of the two civil cases shows ordinary civil litigation proceeding without favoritism to any party, and certainly not to Fairchild Construction. Both cases were resolved by settlements that were entirely unremarkable.

This Memorandum will review the full facts of the two civil cases, and then will explain several key considerations that establish that Judge Nixon's conduct in these matters were entirely proper, including:

1. Judge Nixon's purchase of oil interests from Wiley Fairchild gave Judge Nixon no financial interest in Mr. Fairchild's businesses generally, or in the matters specifically raised in the two civil cases. Judge Nixon purchased an asset from Wiley Fairchild, and that was the extent of the financial relationship. He did not acquire an interest in any of Fairchild's business activities, just as a judge who buys a car from a car dealership does not acquire an interest in the further business activities of the dealership.

2. Judge Nixon's involvement in the Boam Company case was virtually non-existent, since the case was handled

almost entirely by Magistrate John Roper. The case also was settled before Judge Nixon had even a verbal agreement to purchase the oil interests from Wiley Fairchild.

3. The Seymour litigation involved two consolidated cases. In one case, Fairchild Construction was not a party and Judge Nixon could not be disqualified from hearing it. In the other case, Fairchild Construction was only a nominal party since its insurer bore all liability up to $500,000, all court costs and all attorneys' fees. The insurer selected the attorney to appear for Fairchild Construction, conducted the lawsuit, negotiated the settlement, and paid $166,250 toward the settlement.

4. The other two judges in the Southern District of Mississippi withdrew from the Seymour cases before they were assigned to Judge Nixon, so any disqualification by him would have required extraordinary arrangements for a new judge.

5. Judge Nixon's rulings relating to the Fairchild company in the Seymour matter involved granting an unopposed motion for summary judgment and denying reciprocal motions for summary judgment.

6. Both Wiley Fairchild and Judge Nixon have testified that the oil investment had no connection to any litigation, including these two civil cases.

To fill out the factual record, we are submitting with this Memorandum sworn statements by Walter L. Nixon, Jr., George Morse and Joe Sam Owen.

Following the factual recitation, we will address each of the questions raised in Chairman Edwards' letter.

I.

FACTUAL BACKGROUND

In the late 1970s and early 1980s, there were three active judges in the Southern District of Mississippi, Chief Judge Harold Cox, Judge Dan Russell, Jr. and Judge Nixon. Each of them carried hundreds of active cases on his docket, with the number sometimes exceeding one thousand. Declaration of Walter L. Nixon, Jr., ¶ 4 (Attachment A). Because of this caseload, the judges relied heavily upon the Federal Magistrates to supervise discovery and resolve preliminary matters, and even to conduct full civil trials when the parties consented.

A. Boam Company Case

Boam Company v. Dependable Insurance Co. was filed in state court in October 1977, but was removed to federal court a month later and assigned to Judge Nixon. At the time the case was filed, Judge Nixon had had no contact whatever with Carroll

Ingram or Wiley Fairchild concerning a possible investment. Those conversations did not begin until 1979.

The lead plaintiff, the Boam Company ("Boam"), was the prime contractor for the City of Gulfport, Mississippi for the construction and renovation of pump stations. Boam subcontracted part of the work to Newkirk Construction Co. ("Newkirk"), but Newkirk did not complete the work. Boam sought to have Newkirk's bonding company, Dependable Insurance Co. ("Dependable"), take over the project, but Dependable refused to do so. Boam was forced to subcontract the work not performed by Newkirk to Magnolia Construction Co., but the City of Gulfport defaulted Boam anyway.

The lawsuit was filed by Boam and an affiliated company against Dependable and Newkirk. Eleven subcontractors and suppliers intervened. On August 25, 1978, W.R. Fairchild Construction Co., Ltd. ("Fairchild Construction") moved for leave to intervene. Fairchild Construction had performed certain work on the pump station projects, and simply claimed against all parties for its time and materials. According to Court records, Fairchild Construction's motion for leave to intervene was heard by Magistrate John M. Roper for five minutes on September 7, 1978, and was granted. By that point, Magistrate Roper had taken active responsibility for the case, having convened two hearings on preliminary matters (on March 16, 1978 and July 27, 1978). Indeed, the Magistrate signed the order of September 7, 1978, granting leave to intervene to Fairchild Construction.

Magistrate Roper heard further preliminary issues on September 27, 1978, November 7, 1978, and March 14, 1979.

The only substantive involvement of Judge Nixon in the case appears to have occurred between May and August of 1979, when a number of motions for summary judgment were filed by various parties. On May 3, 1979, he heard 50 minutes of argument on the motion of Magnolia Construction Co. to be dismissed as an involuntary party-plaintiff, and on motions for summary judgment by Boam against counterclaims brought by two subcontractors, Thornton Construction Co. and Mississippi Valley Equipment Co. At that point in the litigation, Fairchild Construction did not even appear in the caption used on pleadings. Fairchild Construction was not involved in either motion argued on May 3, and counsel for Fairchild Construction did not attend the hearing.

The principal defendant, Dependable Insurance, then brought motions for summary judgment against seven of the subcontractors, including Fairchild Construction. A 10-minute hearing was held by Judge Nixon on June 5, at which ten counsel were present, including counsel for Fairchild Construction. As reflected on the court record of that session, the matter was carried over "to be referred to Judge Roper." Judge Nixon signed several stipulated orders among the various third-party plaintiffs and defendants later in June 1979. Fairchild Construction was not a party to any of those orders, all of which were agreed to by the parties involved.

On July 9, 1979, the principal parties executed a Stipulation of Consent agreeing to have the case tried by Magistrate Roper. On August 8, 1979, Judge Nixon signed orders denying Dependable's summary judgment motions against the seven subcontractors, including Fairchild Construction. There is no record that the motions were ever argued before the Court on their merits. Indeed, it appears that the motions were pro forma pleadings without any substance whatever.

On August 27, 28 and 29, 1979, the full case was tried before Magistrate Roper. The court records indicate that the trial proceedings before the Magistrate lasted over eight hours, and that a stipulated settlement was reached among the parties on the third day of trial. Under the stipulation, Dependable agreed to pay $253,000 on the bond it had issued for Newkirk Construction. The lion's share of the recovery went to Boam, which won $190,000. The City of Gulfport recovered $27,000, Fairchild Construction recovered $17,000, and other claimants recovered smaller amounts. All counsel of record, Magistrate Roper and Judge Nixon signed the stipulated Order of Dismissal of the action. Although the stipulation of settlement was dated August 29, 1979, the ultimate dismissal of the suit, which was only a formality, was not entered until January 30, 1980.

As is clear from this summary, Judge Nixon played almost no role in the case. Magistrate Roper had operational command of the lawsuit, and the parties themselves ultimately resolved it. The only contested motion decided by Judge Nixon that related to Fairchild Construction concerned the pro forma summary judgment motion brought by Dependable, a party who ended up voluntarily settling the case for $253,000.

B. The Seymour Case

On February 13, 1980, Jack Seymour filed suit in the Southern District of Mississippi under the Jones Act and general maritime law. Seymour had been terribly injured in an accident on a barge during the demolition and removal of the Popps Ferry Bridge in Biloxi. Seymour's action was brought against (i) his employer (L & A Contracting Co.), (ii) the owner and lessor of a barge used on the project (Moody Brothers of Jacksonville, Inc., and Gulf Coast Pre-Stress Co.), (iii) the owner of a tug boat used in the project (Ray Sims, Jr.), and (iv) Fairchild Construction.

Fairchild Construction's only participation in the bridge project had been to drive the pilings for the new bridge to be erected. Fairchild Construction had no role in demolition and removal of the old bridge, which was the process during which Mr. Seymour was injured. Indeed, Fairchild Construction was named in only one of the seven causes of action in the Complaint. That claim alleged that Fairchild Construction negligently failed to perform its duty to provide Seymour, an employee of L & A Contracting, with a safe place to work. In the words of the Complaint, Fairchild Construction was supposedly "guilty of negligence by virtue of the negligence of the Defendant, L & A Contracting Company, being imputed to the Defendant, W.R. Fairchild Construction Company, Ltd." Complaint, ¶ 20.

Seymour's lawsuit was initially assigned to Judge Russell. On February 25, 1980, Seymour filed an amended suit to add a claim against the engineering firm involved in the project, Brown Engineers, Inc., and a further claim against L & A Contracting.

On March 20, 1980, the primary defendants -- L & A Contracting, Gulf Coast Pre-Stress Co., and Moody Brothers -- filed their own Complaint under maritime law seeking exoneration and limitation of liability. Since Fairchild Construction had not been named in any of Mr. Seymour's maritime law claims, Fairchild Construction was not a party to this second action. The docket sheet indicates that the case was initially assigned to Chief Judge Cox, but was reassigned to Judge Russell "per instructions of the Court" (presumably Chief Judge Cox). We assume the reassignment to Judge Russell was made because the new action was related to the Seymour complaint, which had been assigned to Judge Russell. [1]

At roughly the same time, however, Judge Russell withdrew from the original Seymour case. We have been unable to establish with certainty the reason for his withdrawal, but we believe it was prompted by the entry into the case of George Morse of White & Morse in Gulfport as counsel for the insurer of

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[1] We have consulted with Court personnel concerning this sequence, and they have been unable to provide any certain explanation for the reassignment from Chief Judge Cox beyond the entries on the Court docket. It was also reputed in the Southern District of Mississippi that Chief Judge Cox preferred not to sit on maritime cases such as Seymour.

Fairchild Construction. Judge Russell's nephew, Paul Frank, was a partner in that law firm, and the court clerk's staff had standing orders to reassign to another judge any case in which White & Morse appeared. See Affidavit of Joe Sam Owen, ¶ 3 (Attachment B); Affidavit of George Morse, ¶ 3 (Attachment C). The case was then reassigned to Judge Nixon.

It should be emphasized that White & Morse did not represent Fairchild Construction, but rather represented Fairchild Construction's insurer, Home Insurance Co. White & Morse's practice primarily consisted of insurance defense work. Morse Aff. ¶¶ 1, 2. In the words of Mr. Morse, the insurance counsel, "I was retained by HOME INSURANCE COMPANY to defend claims filed by Jack N. Seymour . . . . HOME INSURANCE COMPANY had the liability coverage on [Fairchild Construction] . . . . The amount of liability coverage available to FAIRCHILD was [$500,000]. . . . FAIRCHILD had its own lawyer, Honorable Bruce Aultman of Hattiesburg, Mississippi, who monitored our representation of his client because of exposure of FAIRCHILD to a judgment in excess of the policy limits." Id., ¶ 2.

Counsel for Seymour then moved for consolidation of the maritime case filed by L & A Contracting with Seymour's own Complaint. That unopposed motion was granted by Judge Russell on May 1, 1980. Under local court practice, the case proceeded under the docket number of the first case filed, Seymour's own Complaint, which had been assigned to Judge Nixon. Thus, the consolidated matter was in Judge Nixon's court in May 1980.

Discovery notices, which ordinarily do not come to the attention of the judge, were filed through the summer of 1980. In July, Seymour amended his Complaint again to add a ninth cause of action against all of the named defendants under the Longshoreman and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b).

Fairchild Construction moved for summary judgment against the plaintiff, and the matter was submitted to Judge Nixon on September 3, 1980. Counsel for the plaintiff, Joe Sam Owen, and Fairchild Construction's lawyer, George Morse, both recall that the plaintiff did not oppose the motion. Mr. Morse states that the "motion was unopposed by the plaintiff," so he drafted an Order dismissing the claims against Fairchild Construction. Morse Aff., ¶ 5; Owen Aff., ¶ 6. Mr. Owen, the plaintiff's counsel, states that he had concluded that Fairchild Construction "was not responsible for Seymour's injuries." Owen Aff., ¶ 6.

As is reflected in the Order entered by Judge Nixon on September 3, 1980, Counts 1, 2, 4, 5, 6, 7 and 8 of the Complaint did not present any causes of action against Fairchild Construction, and therefore Fairchild Construction was entitled to judgment on them. Counts 3 and 9 alleged that Fairchild Construction had breached its duty to supply Seymour a safe place in which to work, but Judge Nixon held that there was "no genuine issue of fact concerning the total absence of any participation by Fairchild in the dismantling of the Old Popps Ferry Bridge." Findings of Fact and Conclusions of Law, p. 2. This finding had been conceded by the plaintiff in discovery, since he had admitted that Fairchild Construction had no involvement in the demolition and removal work. Accordingly, Fairchild Construction was entitled to judgment on those two counts as well.

On November 26, 1980, Judge Nixon heard cross-motions for summary judgment between Brown Engineers and Fairchild Construction on Brown's crossclaim, and denied them both. Fairchild Construction then filed a crossclaim against L & A Contracting on Brown's crossclaim. The cases then entered a lengthy period of quietude.

On April 16, 1982, a 30-minute pretrial conference was held before Judge Nixon. The Court records reflect that settlement discussions were under way, with "counsel to explore settlement possibilities and report back to the Court." Plaintiff's counsel, Mr. Owen, states that Judge Nixon did not participate in those settlement talks. Owen Aff., ¶ 8. One month later, on May 17, 1982, Magistrate Roper conducted a hearing on a proposed Stipulation of Settlement, under which the defendants agreed to pay Seymour $665,000. Although it is not disclosed in the court papers, Fairchild Construction's insurer paid $166,250 of this amount, on behalf of Fairchild Construction. Morse Aff., ¶ 7. [2] Based on the settlement,

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[2] We have been troubled to discover that the Subcommittee's investigators acquired a very incomplete and one-sided statement from Mr. Morse, which is dated January 4, 1989. (Attachment D). That Affidavit states that Fairchild Construction "contributed no money" to the settlement, but does not disclose that the company's insurer paid $166,250. Indeed, the January 4 Affidavit states only that Mr. Morse represented a "party (Cont'd)

Judge Nixon signed a pro forma order dismissing all pending lawsuits.

II.

DISCUSSION

This Memorandum will examine first the application to these two civil cases of the standards for disqualification under 28 U.S.C. § 455 and the Code of Judicial Conduct. Then we will establish that the federal gratuity statute, 18 U.S.C. § 201, is entirely inapplicable to these facts. We also will point out that -- even if Judge Nixon could properly have disqualified himself from hearing the two civil cases -- the failure to do so does not constitute a "high crime" or "high misdemeanor" justifying impeachment; since 1976 at least ten federal judges have been judicially determined to have illegally heard cases in which they should have recused themselves, yet not one has been the subject of an impeachment resolution for that error. Finally, we will explain that these two civil cases provide no basis for finding improper conduct by Judge Nixon.

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litigant," without disclosing the central role in the case of Mr. Morse's client, Fairchild Construction's insurer. The January 4 Affidavit also does not disclose that Fairchild Construction's motion for summary judgment was unopposed by Seymour, nor does it disclose that Judge Nixon denied Fairchild Construction's contested motion for summary judgment against Brown Engineers. We are extremely concerned that the Subcommittee is receiving such incomplete and even misleading information. We do not know if other written statements have been acquired by staff that are similarly incomplete, but we would urge the Subcommittee to insist on full factual disclosure and to allow us to supplement the factual record put together by staff.

A. Disqualification Under Sec. 455 and the Code of Judicial Conduct

The standards for disqualification of a judge under 28 U.S.C. § 455 and the Code of Judicial Conduct are very similar, so we will treat them together. We first will dispel any thought that Judge Nixon held any financial interest that disqualified him from hearing the Boam Company or Seymour cases. In fact, under both the statute and the code of judicial conduct, Judge Nixon plainly had no financial interest in either case.

Then we will address the "catchall" provisions for judicial disqualification, which call for recusal when the judge's "impartiality might reasonably be questioned." Although this criterion is intended to be an "objective" standard for conduct, many courts have recognized that it involves a delicate balance among many factors, including the difficulty of managing a heavy docket, the undeniable fact that every judge will have extensive ties throughout his home community, and the often-imponderable question of public perception. When all of these elements are evaluated, Judge Nixon was not obligated to disqualify himself.

1. Judge Nixon Had No Financial Interest In Either Lawsuit -- Under § 455(b)(4), a judge must recuse himself when he knows that he "has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." Canon 3(C)(1)(c) establishes an identical standard for recusal.

At the threshold, it is important to review exactly what Judge Nixon purchased from Wiley Fairchild and when he did so. In 1979, he talked with Carroll Ingram about possible investments, and Wiley Fairchild's oil operations came up. Mr. Ingram asked Mr. Fairchild about a possible investment by Judge Nixon, but there was no positive response until late 1979 or early 1980. Cong'l Tr., July 7, 1988, pp. 64-65 (Fairchild); Cong'l Tr., July 12, 1988, p. 20 (Nixon). By early 1980, Judge Nixon concluded that he had a verbal agreement to purchase some oil interests, but the verbal agreement did not become legally enforceable until the deeds were executed in early 1981 and were registered in the land records of Alabama and Mississippi. Cong'l Tr., July 12, 1988, p. 35 (Nixon).

Thus, Judge Nixon purchased three assets from Wiley Fairchild; he acquired no interest whatever in Fairchild's business operations. The future income from those oil interests, whatever that income might be, depended solely on how well those oil properties produced and were totally unrelated to Fairchild's success in other business ventures. Judge Nixon did not stand to gain or lose based upon the fortunes of Fairchild's businesses. This lack of a financial interest in Fairchild's businesses was even stronger in relation with the construction activities of W.R. Fairchild Construction Co., Ltd. Judge Nixon had no substantive contact at all with that construction business. [3]

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[3] After Judge Nixon acquired the oil assets, he received the royalty checks from Fairchild's companies, but this was a bureaucratic formality that was dictated because Fairchild was (Cont'd)

More specifically, Judge Nixon had no financial interest in the Boam Company and Seymour lawsuits. Whether Fairchild Construction was paid for its work on the pump station projects in Gulfport had no impact on Judge Nixon's oil holdings. Similarly, those oil interests were unaffected by the outcome of Jack Seymour's personal injury claim, which was handled entirely by Fairchild Construction's insurer.

Fairchild Construction itself had very little real financial interest in the Seymour personal injury claim. All of the defense costs and all liability up to $500,000 was borne by Fairchild Construction's insurer, Home Insurance Co. Morse Aff., ¶ 2. Since the injury claim concerned an accident during bridge demolition not involving Fairchild Construction, the company had no financial exposure, as a practical matter, above the insurance amount. And Judge Nixon had no financial interest at all in the Home Insurance Co.

Finally, there is absolutely no basis for suggesting that Judge Nixon somehow had a speculative financial interest in the two civil cases because he supposedly hoped to purchase future oil investments from Wiley Fairchild. The Boam Company case was fully resolved by stipulation before Magistrate Roper in August 1979, at a time when Judge Nixon had no idea whether he would purchase any interests from Wiley Fairchild or whether any such transactions would be profitable. (Indeed, the record is

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unable to persuade the operators of the oil well (Getty, Texaco, etc.) to take over this bookkeeping function. Cong'l Tr., July 8, 1988, p. 136 (Ingram). That administrative arrangement gave Judge Nixon no financial interest in the Fairchild companies.

clear that oil investments -- including those with Wiley Fairchild -- often are not profitable. E.g., Cong'l Tr., July 7, 1988, pp. 15-17 (Fairchild).) Similarly, the Seymour case was fully resolved by voluntary settlement in May 1982, at a time when Judge Nixon was first beginning to receive royalties from the oil investments. Cong'l Tr., July 6, 1988, p. 83 (Fairchild). Indeed, the only conversation concerning a possible future investment through Fairchild occurred in October 1982, Cong'l Tr., July 12, 1988, p. 43 (Nixon), long after both civil cases were resolved by settlement. As the Fifth Circuit has held, "[a] remote, contingent, and speculative interest is not a financial interest within the meaning of the recusal statute." In re Placid Oil Co., 802 F.2d 783, 787 (5th Cir. 1986).

2. Recusal Was Not Required To Avoid The Appearance Of Impropriety -- The broad standard for recusal when the court's "impartiality might reasonably be questioned" can be difficult to apply. As the Supreme Court has recognized, "[w]hen a busy federal judge concentrates his or her full attention on a pending case, personal concerns are easily forgotten." Liljeberg v. Health Service Acquisition Corp., 108 S.Ct. 2194, 2204 (1988). The Supreme Court expressed the expectation that there will be failures to recuse "by busy judges who inadvertently overlook a disqualifying circumstance." Id., at 2203 (footnote omitted).

Judge Nixon's recent Declaration states that he has no recollection of making a connection between the oil investment and Fairchild Construction's appearance in the two civil cases. (Attachment A). This failure to connect the two matters is surely understandable in view of his small involvement in the two civil cases, which were a tiny part of his very heavy docket. Moreover, Mr. Fairchild said nothing to Judge Nixon to make that connection, since the cases were never mentioned by Mr. Fairchild and Mr. Fairchild himself has testified that he was not aware of having any cases before Judge Nixon at the time of the investments. Cong'l Tr., July 7, 1988, p. 11 (Fairchild). When the appropriate legal standard is applied to the facts of the two civil cases, it is clear that recusal was not required.

a. The Legal Standard

The recusal standard under § 455(a) is directed to possible public perceptions. The Supreme Court wrote in Liljeberg, (108 S.Ct. at 2204-05) (footnote omitted):

> The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.

The courts have insisted, however, that this standard does not require recusal for every allegation that the judge has a connection to the parties, the attorneys, or the lawsuit. Indeed, the House Report on § 455(a) cautioned that the statute should not permit litigants to disqualify judges simply because they "are in fact seeking to avoid the consequences of his expected adverse decision," and should not be "used by judges to avoid sitting on difficult or controversial cases." House Report

No. 93-1453, adopting Senate Report No. 93-419, reprinted in [1974] U.S. Cong. & Admin. News, 93d Cong., 2d Sess. 6351.

One Court has noted that automatic application of § 455(a) would open the "floodgates" to unacceptable "judge-shopping" by litigants. Mavis v. Commercial Carriers, Inc., 408 F. Supp. 55, 61 (C.D. Calif. 1975); see United States v. Boffa, 513 F. Supp. 505, 508 (D. Del. 1981). The Seventh Circuit has recognized the same problem: "Automatic disqualification allows the party to manipulate the identity of the decisionmaker and may be no more healthy for the judicial system than is the denial of a borderline motion." New York City Housing Development Corp. v. Hart, 796 F.2d 976, 981 (7th Cir. 1986) (per curiam). That Court explained, "ready recusal benefits the judge who steps aside, and the litigant who sought this outcome, but it may injure the judge who must take over the case and the litigant aggrieved by the substitution." Id.

Thus, the "reasonable person" standard for recusal must be based on the attitudes of an informed and knowledgeable member of the community, not mere unthinking suspicions. As the First Circuit has distilled the countervailing concerns (In re United States, 666 F.2d 690, 695 (1st Cir. 1981) (emphasis in original):

> [D]isqualification is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality. Were less required, a judge could abdicate in difficult cases at the mere sound of controversy or a litigant could avoid adverse decisions by alleging the slightest of factual bases for bias . . . . This restricted mandate to disqualify is calculated to induce

> a judge to tread the narrow path between timidity and tenacity.

See United States v. DeLuna, 763 F.2d 897, 907 (9th Cir.), cert. denied sub nom. Thomas v. United States, 474 U.S. 980 (1985) ("Disqualification is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality"); Suson v. Zenith Radio Corp., 763 F.2d 304, 308 n.2 (7th Cir. 1985) ("The district judge is, of course, obligated not to recuse himself without reason just as he is obligated to recuse himself when there is reason") (citation omitted).

The application of this standard can be difficult. For example, the courts of appeals have divided over whether, under § 455(a), a judge must be recused from presiding over a bank robbery prosecution when the judge owned stock in the bank that was robbed. Compare United States v. Sellers, 566 F.2d 884, 887 (4th Cir. 1977), cert. denied, 462 U.S. 1118 (1983) (judge's impartiality would not reasonably be questioned), with United States v. Nobel, 696 F.2d 231, 235 (3d Cir. 1982) (no "financial interest" requiring disqualification, but recusal required to avoid appearance of impropriety).

b. Recusal Was Not Required Under Sec. 455(a) In The Boam Company Case

The Boam Company case was filed in 1977 and assigned to Judge Nixon. He surely had no basis whatever for recusal in this case. Judge Nixon had no contact with Wiley Fairchild during the pendency of the case, and Fairchild Construction was a peripheral party to the action, ultimately collecting less than 10 per cent of the amounts paid to all parties by the bonding company. The litigation was handled almost exclusively by Magistrate Roper, which effectively screened the matter from Judge Nixon's attention. The only order entered by Judge Nixon that concerned Fairchild Construction concerned the denial of an apparently pro forma summary judgment motion in August 1979, at a time when Judge Nixon did not know whether Wiley Fairchild would sell him an oil interest or not. Judge Nixon took no action that would allow an "objective, knowledgeable member of the public would find . . . a reasonable basis for doubting the judge's impartiality" at that time." 4/

c. Recusal Was Not Required Under Sec. 455(a) In The Seymour Litigation

By September 1980, when Judge Nixon signed the unopposed dismissal of Fairchild Construction from the Seymour case, he had a verbal agreement to acquire the oil properties from Wiley Fairchild. Cong'l Tr., July 7, 1988, pp. 64-65 (Fairchild); Cong'l Tr., July 12, 1988, p. 20 (Nixon). That agreement, however, would not provide a reasonable basis for an "objective, knowledgeable" observer to be concerned about bias in Seymour. It is essential to recognize that Fairchild Construction was a party to the Seymour litigation in only a very remote and speculative manner.

4/ Of course, this analysis is necessarily hypothetical because Judge Nixon did not at the time even notice any role of Fairchild Construction in the case.

The Seymour litigation involved two consolidated cases: the personal injury claim by Seymour and the action for exoneration by L & A Contracting. Fairchild Construction was not a party to the exoneration action so there was no basis for recusal in that case. That was precisely the holding of the Fifth Circuit in Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1115-16 (5th Cir.), cert. denied, 449 U.S. 820 (1980), which concerned two consolidated cases, one for contract claims and the second for exoneration and limitation of liability. District Judge Brevard Hand was found to be disqualified from hearing the contract case because of the role of his former law firm in the case. The Court of Appeals, however, held that Judge Hand properly presided over the consolidated action for exoneration, in which his former law firm did not appear.

But Fairchild Construction was not really a party to the personal injury action in Seymour. Fairchild Construction had a $500,000 insurance policy with Home Insurance, which was obligated to defend the lawsuit. Although the insurer defended the action in Fairchild Construction's name, Fairchild Construction had no liability for court costs, attorney fees, or the first $500,000 of liability. Morse Aff., ¶ 2.

Under Mississippi law, an insurer "'assume[s] exclusive control of the claim against the insured, and [takes] unto itself the power to determine for the insured all questions of liability, settlement, of defense and management before and during trial, and of appeal after final judgment.'" Martin v. Travelers Indemnity Co., 450 F.2d 542, 551 (5th Cir. 1971), quoting American Mut. Lib. Ins. Co. v. Cooper, 61 F.2d 446, 448 (5th Cir. 1932), cert. denied, 289 U.S. 736 (1933). An insurer, of course, has an obligation to consider the interests of the insured in conducting the lawsuit. But Mississippi law gives insurers unusually broad discretion in defending the lawsuit, imposing only the minimal requirement that the insurer not act in a manner "so arbitrary and unreasonable as to constitute fraud." Id. at 551. See Nichols v. State Farm Mutual Automobile Ins. Co., 345 F. Supp. 212, 216 (N.D. Miss. 1972) (insurer's actions need only not constitute "arbitrary disregard for the insured's interest and [not] be tantamount to fraud") (footnote omitted).

In this situation, Fairchild Construction was a true party in the personal injury action only to the extent its liability might exceed $500,000 -- a very unlikely turn of events in view of Fairchild Construction's total non-involvement in the bridge demolition work. For any liability below that amount, Home Insurance Co. was the truly interested party. Any objective and knowledgeable observer, knowing all of these facts, would conclude that there was no reasonable basis for questioning Judge Nixon's impartiality in that case.

Even if Fairchild Construction had truly been a party to the action, recusal still was not required since Judge Nixon had no interest in any Fairchild businesses. His purchase of the oil interests was not different in substance from the purchase by a judge of a new car, on a five-year note, from a local car dealership. Such a purchase and continuing obligation to pay off the note would not create a reasonable basis for questioning the Court's impartiality in a personal injury case involving that dealership.

Again, the First Circuit's opinion in In re United States is instructive. In that case, the government argued that a trial judge could not preside over a prosecution because the defendant had once performed a favor for a close friend of the judge. The court of appeals noted that "it is beyond contemplation that such gratitude would be of the weight necessary to cause a judge to jettison his impartiality and, in open court day after day, to violate his deepest professional and ethical commitments as a judge." 666 F.2d at 696. The Court emphasized that every judge will have some connections with many litigants (id. at 696-97):

> If the receipt by a judge's friend of a favor long ago from one who is a present litigant should disqualify the judge, judges could hope to preside without challenge solely in communities in which they are strangers. For when a judge presides in an area where he and his family have lived for one or more generations, the numbers of people who have, directly or indirectly, helped family members, relatives, close friends, and friends of friends would form a large and indeterminate community. . . . Not only would the role of judges be severely constricted by requiring disqualification under these circumstances but the result would reflect a more jaundiced view as to when there should be a reasonable doubt about a judge's impartiality than accords with the public perception.

Other circumstances in this case reinforce the conclusion that recusal was not mandated. First, Judge Russell already had been disqualified from the lawsuit, and Senior Judge Cox had withdrawn from it. This left Judge Nixon as the only active judge in the District who could hear the case. Although arrangements can be made for a case to be heard by a judge from another district, there is a proper reluctance to trigger such extraordinary measures in the absence of a directly disqualifying problem. 5/

Second, there is no evidence whatever of any bias in Judge Nixon's conduct. He granted an unopposed motion by Fairchild Construction for judgment on seven claims that did not even name Fairchild Construction, and on two claims for negligence in an employment situation with which Fairchild had no involvement whatever. See pp. 11-12, supra. Counsel for the plaintiff and for Fairchild Construction agree that the motion was unopposed, so it would have been granted no matter who the judge had been. Morse Aff., ¶ 5; Owen Aff., ¶ 6. Moreover, Judge Nixon denied motions for summary judgment on the crossclaim by Brown Engineers, and Fairchild Construction's insurer ended up paying approximately one-fourth of the ultimate settlement of $665,000. Both trial counsel agree that Judge Nixon demonstrated no bias whatever in his conduct of the case. Morse Aff., ¶ 9; Owen Aff., ¶ 7. The absence of bias in the judge's conduct

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5/ Such a special arrangement was reached when Judge Nixon recused himself from a securities fraud action that was brought on behalf of a class, including him, of investors in another oil venture. Cong'l Tr., July 12, 1988, pp. 32-34 (Nixon).

supports the conclusion that "appearances" did not require recusal. In re United States, 666 F.2d at 697-98.

Third, it is undisputed that by the time the Seymour case was settled in May 1982 neither Wiley Fairchild nor any Fairchild representative had made any request of Judge Nixon. Even the eventual conversation concerning Mr. Fairchild's concerns that Bud Holmes was "blackmailing" him did not occur until after December 1982, according to both Judge Nixon and Wiley Fairchild. Cong'l Tr., July 12, 1988, p. 46 (Nixon); Hearing on Post-Conviction Petition, Tr. 201-02 (August 29, 1988) (Fairchild).

Recusal based on the "appearance of impropriety" is not an area of sharp, black-and-white distinctions. As the First Circuit has written about recusal under § 455, "in many cases reasonable deciders may disagree, [so] the district judge is allowed a range of discretion." 666 F.2d at 695. Judge Nixon's participation in the personal injury case surely can "be defended as a rational conclusion supported by [a] reasonable reading of the record." Id. This determination, we emphasize, must be made on the basis of the facts and circumstances existing in April of 1982: before the success of the oil interests was known; before Wiley Fairchild had ever mentioned his son to Judge Nixon; before Judge Nixon had appeared before a federal grand jury; and before his life had been turned inside out by the Justice Department. At that point in April 1982, the need for recusal was by no means clear.

Judge Nixon's connection to Fairchild Construction in 1982 was considerably less than the connections between Judge W. Eugene Davis of the Western District of Louisiana and the landowners who were defendants in Chitimacha Tribe of Louisiana v. Harry L. Laws Co., 690 F.2d 1157 (5th Cir. 1982), cert. denied, 464 U.S. 814 (1983).

While in private practice, Judge Davis had represented one of the defendants, Texaco, Inc.; the Fifth Circuit ruled that "the fact that he once represented Texaco in unrelated matters does not forever prevent him from sitting in a case in which Texaco is a party." Id. at 1166. Judge Davis' former law firm still represented Texaco in other matters and Judge Davis was still receiving periodic payments from that law firm six years after leaving it; the Fifth Circuit found no problem since there was no showing "that he is sharing in profits of the firm earned after his departure." Id. (footnote omitted). Relatives of Judge Davis' former law partners were defendants in the lawsuit; the Fifth Circuit found that connection "too remote to justify recusal." Id. at 1167. Judge Davis had rendered title opinions and handled the sale of some of the parcels claimed by the Indian tribe; the Fifth Circuit found this allegation too vague. The Court of Appeals concluded that "a reasonable man, had he known of all the circumstances asserted, would not harbor doubts about Judge Davis' impartiality." Id.

Compared to these facts, Judge Nixon's purchase of oil interests from Wiley Fairchild created even less basis for suspecting Judge Nixon would not be impartial in a personal injury case in which Fairchild Construction (i) had limited liability compared to other defendants, and (ii) had no liability at all below $500,000.

It surely may be argued that, had Judge Nixon focused on the naming of Fairchild Construction in the Seymour case and on the oil interests he was purchasing from Mr. Fairchild, he might have concluded that he could recuse himself. With the benefit of hindsight, the recusal decision may seem considerably simpler than it would have been in April 1982. But in view of all of the circumstances in the case, he was under no obligation to do so.

B. The Two Civil Cases Do Not Establish Any Gratuity Offense

The letter from the Chairman dated January 9, 1989, asks whether Judge Nixon's rulings in the two civil cases could be construed as "'official acts' for purposes of establishing an illegal gratuity." As a purely academic matter, rulings by a court could constitute "official acts" within the meaning of the gratuity statute, but that certainly does not make out a gratuity offense here. Two critical elements of a gratuity offense under 18 U.S.C. § 201 are entirely missing from this record, as they were at trial, and the existence of the two civil cases does not fill those gaps.

The gratuity statute prohibits a public official from "receiv[ing]" "anything of value personally for or because of any official act performed or to be performed by such official or person," "otherwise than as provided by law." 18 U.S.C. § 201(c)(1)(B). Unlike the bribery statute, the gratuity provision does not require a "corrupt[]" intent on the part of the public official, but it does require criminal intent to the extent that the public official is aware that the thing being received has been paid because of the donor's interest in an official act. As the Supreme Court ruled in United States v. Brewster, 408 U.S. 501, 527 (1972), under the previous codification of the gratuity statute, "it is necessary to show that [the official] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act. . . . [E]vidence of the [official's] knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury."

The first fatal flaw in any gratuity allegation here is the complete absence of evidence that, at the time of the investment, either Wiley Fairchild or Judge Nixon had any idea that the two civil cases existed, much less that the investment was somehow connected to the civil cases. Wiley Fairchild has testified that he was not aware of any case he had pending before Judge Nixon at the time of the investment, that he did not intend to influence Judge Nixon's decision on any case, and that he expected Judge Nixon to recuse himself from any case in which Fairchild might be involved. Cong'l Tr., July 7, 1988, pp. 11, 34 (Fairchild). Similarly, Judge Nixon had no thought of the two civil cases at the time of the investment (Attachment A), and indeed had had almost no contact with the Boam Company case and very limited contact with the Seymour matter.

At the time of the verbal agreement to acquire the oil interests in early 1980, the Seymour case had just been filed and was still assigned to other judges. Between the time of that verbal agreement and the execution of the deeds in early 1981, the only matters to reach Judge Nixon involved Fairchild Construction's insurance company, which brought the unopposed motion for summary judgment against the plaintiff and the unsuccessful cross motion for summary judgment against Brown Engineers. Surely Judge Nixon performed no official acts for Fairchild Construction in entering those orders.

The gratuity statute does not require that the official be influenced in his official actions by the gratuity, but it does require that the official and the donor actually have official acts in mind in connection with the payment of the gratuity. The statute specifically provides that the payment must be "for or because of any official act." 18 U.S.C. § 201(c)(1)(B). On this record, there is no evidence that either Fairchild or Judge Nixon had -- or could have had -- the requisite mental state to violate the gratuities statute. At a bare minimum, Judge Nixon would have to have accepted any payment to him (had there been one) "with knowledge that [the donor's] purpose was to reward him for his [official acts]." United States v. Anderson, 509 F.2d 312, 332 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975). But neither he nor Wiley Fairchild had any thought of the two civil cases, any other cases, or any possible cases in connection with the oil investment.

We wish to emphasize the real-world context for viewing the two civil cases. The two civil cases may look particularly significant when they first come to attention after five years of excruciating investigation. But the reason they have not previously come to light is precisely because they were of no particular significance. The civil cases were scarcely major concerns to either Judge Nixon or Wiley Fairchild. For Mr. Fairchild, the Boam Company case involved an $18,000 claim against a bonding company that had no legal defenses, while the Seymour case was entirely covered by insurance. In view of Fairchild's extremely modest exposure in those cases, it would not even occur to Wiley Fairchild to pay money to influence a judge over these two cases. For Judge Nixon, both cases barely came to his attention and both were settled. The two civil cases provide no basis at all for going behind the jury's verdict of acquittal on the gratuity charge and dreaming up an entirely new scenario for such an offense.

The second fatal defect in any gratuity allegation in this case is the plain fact that Judge Nixon received nothing from Wiley Fairchild that he did not pay for in full. Judge Nixon fully believed that he was charged a fair price for the oil interests, and was not seeking a gift or free benefit. Cong'l Tr., July 12, 1988, pp. 21-23, 28 (Nixon). He was engaged in a commercial transaction, buying an asset for value. Wiley Fairchild agrees that he charged Judge Nixon a fair price for the oil interests, that there was no gift involved, and that he made a substantial profit on the interests he sold to Judge Nixon.

Cong'l Tr., July 6, 1988, p. 55 (Fairchild); Cong'l Tr. July 7, 1988, p. 14 (Fairchild).

Moreover, Mr. Fairchild's agreement to accept a note, with 10 per cent interest, certainly was no gift. Judge Nixon intended to arrange unsecured financing for the amount of the investment, as he has testified. Cong'l Tr., July 12, 1988, p. 21 (Nixon). As the Subcommittee staff has investigated at great length, Judge Nixon used unsecured bank loans to invest in other oil properties during the same period, and there is no reason to doubt his ability to arrange such financing for the Fairchild investment. Cong'l Tr., July 12, 1988, pp. 21, 29 (Nixon). The only reason he did not arrange such separate financing was that he had only one day's notice between the time Carroll Ingram called to say he would bring the deeds and the delivery of the deeds themselves. Cong'l Tr., July 12, 1988, p. 26 (Nixon). Consequently, there was no gratuitous transfer to Judge Nixon that could support an allegation of receiving an illegal gratuity.

C. Judge Nixon's Failure To Recuse Himself Is Not An Impeachable Offense

As we have detailed above, Judge Nixon had no obligation to recuse himself from either civil case, so there can be no real claim that the failure to do so is an impeachable offense. But even if he was under such a duty, his failure to recuse could not constitute an impeachable offense.

We will not repeat all of the legal analysis of the recusal decision, see pp. 18-28, supra, but the Subcommittee must recognize that recusal often is by no means a simple question. The Supreme Court in Liljeberg stressed that busy District Court judges may fail to note possible recusal issues, 108 S. Ct. at 2203, while different judges surely may view a particular recusal question differently. Indeed, since 1976 the courts of appeals have ruled that at least ten District Court judges erroneously refused to recuse themselves due to possible conflicts of interest. These cases include the following:

Pepsico, Inc. v. McMillen, 764 F.2d 458 (7th Cir. 1985) Judge Thomas R. McMillen erroneously refused to recuse himself from the case even though a "headhunter," acting in his behalf, had contacted both law firms in the case about possible post-judicial employment for the judge.

Potashnick v. Port City Constr. Co., 609 F.2d 1101 (5th Cir.), cert. denied, 449 U.S. 820 (1980). Judge Brevard Hand (S.D. Ala.) erroneously refused to recuse himself from a case in which one party was represented by the judge's former law partner, who also represented the judge on another matter, and with whom the judge had business dealings. Also, the judge's father still had a profit interest in the law firm involved.

SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977). Judge Robert D. Morgan (S.D. Ill.) wrongly refused to recuse himself from a case in which his brother acted as counsel for one of the parties.

Fredonia Broadcasting Corp. v. RCA Corp., 569 F.2d 251 (5th Cir.), cert. denied, 439 U.S. 859 (1978). Judge William Wayne Justice (E.D. Tex.) erroneously did not recuse himself from a case on which a law clerk had worked while employed by the judge, and in which the law clerk was now counsel.

Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980). Judge Robert L. Taylor, Jr. (E.D. Tenn.) wrongly refused to recuse himself from a sex discrimination suit against Postal Service officials when he had stated his belief that the individual defendant would never intentionally discriminate against anybody.

In re Harry W. Rodgers, III., 537 F.2d 1196 (4th Cir. 1976). Judge Herbert F. Murray (D. Md.) erroneously refused to recuse himself from a criminal prosecution even though a former law partner and a former client would testify about events that took place before he withdrew from the law firm.

Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978). Judge Charles H. Haden II (N.D. W.Va.) erroneously refused to recuse himself from a habeas corpus case that he had heard while on the state Supreme Court.

Liljeberg v. Health Services Acquisition Corp., 108 S. Ct. 2194 (1988). Judge Robert Collins (E.D. La.) wrongly refused to disqualify himself from a case in which a university of which he was a trustee had an interest.

In re Faulkner, 856 F.2d 716 (5th Cir. 1988). Judge A. Joe Fish (N.D. Tex.) erroneously refused to recuse himself from a criminal trial when his cousin was involved in key transactions and had discussed material facts with the judge.

Home Placement Serv. v. Providence Journal Co., 739 F.2d 671 (1st Cir. 1984), cert. denied, 469 U.S. 1191 (1985). Judge Bruce M. Selya erroneously refused to disqualify himself from this antitrust action after the defendant newspaper published a complimentary article about him.

And in United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986), Judge Charles P. Cocoras did not recuse himself from lengthy fraud trial even though he and his family planned to go on a vacation with the prosecutor and his family as soon as the trial ended. The court of appeals held that "[a]lthough perhaps 999 of 1,000 observers would have been stunned to discover that judge and prosecutor were about to go on a joint vacation," one of the defense counsel knew that the two men had vacationed together in the past. Id. at 1538. Consequently, the court of appeals ruled that the motion to disqualify, which was brought after the conclusion of the trial, was too late. 6/

For this Subcommittee to conclude that Judge Nixon should be impeached for his failure to recuse himself, the Subcommittee also would be announcing that each of the ten District Court judges faces possible impeachment for not recusing. Such a drastic course of action plainly was not contemplated by the Framers when they specified that impeachment may only be based on "high crimes" and "high misdemeanours." In our Memorandum to the Subcommittee dated April 14, 1988, we

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6/ Then-Justice Rehnquist refused to recuse himself in Laird v. Tatum, 408 U.S. 1 (1972), even though he was likely to be a key witness in the case if it went to trial. Justice Rehnquist's decision to sit on the case, and to cast the deciding vote in a 5-4 ruling, has been sharply criticized. E.g., Stempel, "Rehnquist, Recusal, and Reform," 53 Bklyn L. Rev. 589 (1987).

reviewed the drafting of the Impeachment Clause and the insistence of the Constitutional Convention on a rigorous impeachment standard. We attach as Attachment E to this Memorandum pages 16-19 of the April 14, 1988 Memorandum, which includes this historical review.

A judge's failure to recuse himself, in the absence of abuse of official power, neglect of duty, or corruption, is simply a judicial error. Judges, like the rest of us, make mistakes every day; unlike most of us, their mistakes are made in public, on the record, and are often pointed out to them by appellate courts. But judges cannot be impeached for such mistakes without destroying the independence of the judiciary. This Subcommittee would set out on a dangerous and unconstitutional course if it attempted to impeach any judge for failure to recuse himself.

D. The Two Civil Cases Have No Significance For This Proceeding

The final inquiry in the Chairman's letter of January 9, 1989 is "the significance of this new evidence [the two civil cases] in light of the testimony to date concerning the Nixon-Fairchild investment and Judge Nixon's willingness to 'help' Wiley Fairchild if he could." As we have now stated in a number of different ways, there is no significance to this additional information.

The court records and the statements of the attorneys are clear that Judge Nixon did nothing wrong or biased or even unusual in the Boam Company and Seymour lawsuits. Judge Nixon and Wiley Fairchild have made clear that they had no thought whatever of the two civil cases when they engaged in the sale of the oil interests, and there is no basis for questioning that testimony. Indeed, Wiley Fairchild has testified that during the plea-bargaining process he lay awake nights trying to think of something incriminating he could say about Judge Nixon. Cong'l Tr., July 7, 1988, p. 57 (Fairchild). If there had been any connection between the investment and the two civil cases, surely Wiley Fairchild would have mentioned it to the prosecutors as he desparately attempted to save his skin.

Moreover, the conclusion that there was absolutely no connection between the investment and the civil cases is reinforced by considering the back-dating of the deeds from February 1981 to February 1980. That backdating has been a centerpiece of the investigation and prosecution, although we have always maintained -- as have Carroll Ingram and Wiley Fairchild -- that it was a routine business action. But, if there really had been some skulduggery in the two civil cases, the parties to the investment would never have backdated the documents to February 1980. The backdating placed the transaction before September and November 1980, when Judge Nixon had ruled on the summary judgment motions in the Seymour case. If Judge Nixon and Wiley Fairchild had wanted to cover their tracks in that case, they would not have backdated the investment to make it effective before those rulings were rendered.

Finally, we address one more time the thoroughly innocuous statement by Judge Nixon to Wiley Fairchild that he would be happy to help Mr. Fairchild if he could, and if he could not help Mr. Fairchild he would just say so. Such sentiments are voiced every day by executive, legislative and judicial officers. That statement does not constitute an invitation to corruption, but rather is a statement of courtesy and fellowship, combined with a warning that there are, of course, things that a public official cannot do and really should not be asked to do.

Judge Nixon has testified that his remark about helping Wiley Fairchild was an "offhand" comment of no particular importance, and a comment he has made to others as well. Cong'l Tr., July 12, 1988, pp. 40-41 (Nixon). He testified that he surely did not intend to communicate to Wiley Fairchild that he would do something improper. Id. Wiley Fairchild understood the comment in precisely that sense. Mr. Fairchild testified that he understood Judge Nixon to be saying that "if you ask me something unreasonable I'm not going to do it." Cong'l Tr., July 6, 1988, p. 84. Mr. Fairchild testified that he expected Judge Nixon to disqualify himself from any case in which Mr. Fairchild might be involved, and that he expected Judge Nixon not to do anything illegal. Cong'l Tr., July 7, 1988, pp. 33-34.

It is striking that after all of this time and all of this investigative effort, the inquiry about Judge Nixon returns to this offhand comment, which was understood by both speaker and listener not to constitute much more than an offer to act with ordinary courtesy and consideration for an acquaintance in the community. No basis for impeachment can be contrived by combining his offhand comment with the entirely proper handling of the Boam Company and Seymour lawsuits.

CONCLUSION

This Subcommittee is charged with carefully weighing all of the facts and the legal considerations in this proceeding. The Subcommittee must be able to tell smoke from substance. We are grateful for this opportunity to comment on the two civil cases, because we believe this "new evidence" is totally inconsequential. It is, to be blunt, smoke and not substance. It involves no improper or even questionable actions by Judge Nixon and provides no basis for any impeachment resolution.

Respectfully submitted,

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Date: January 27, 1988

DECLARATION OF WALTER L. NIXON, JR.

1. I have reviewed the letter dated January 9, 1989 from Chairman Edwards and addressed to my counsel, inquiring about two cases that were filed in the Southern District of Mississippi, Seymour v. L & A Contracting Co., No. S80-0274(N), and The Boam Company v. Dependable Insurance Co., No. S77-0385(N).

2. I have no current recollection at all concerning the Boam Company case, which was filed more than ten years ago and which, based upon the docket sheets I have reviewed, was primarily handled by Magistrate Roper.

3. I do have a slight recollection of the Seymour case, primarily because of the seriousness of the injuries suffered by the plaintiff. I do not recall any of the particular issues raised in the case, the claims, or any orders that were entered. I note that the matter was settled before trial.

4. During the period when these cases were pending in the Southern District of Mississippi, I carried several hundreds of cases on my docket, which sometimes exceeded a thousand cases. I would ordinarily never see the pleadings in a case when they were filed or while the case was pending on preliminary matters, but only when the case came before me on a dispositive motion, for a pretrial conference or for trial. I recall very few of the cases that were settled before trial.

5. Upon review of the docket sheets in the two cases mentioned in Chairman Edwards' letter, I can see that W.R. Fairchild Construction Co. was involved in both actions. I have no recollection at all of noticing that fact at the time the cases were pending, or of connecting that fact with the oil interests that I purchased from Wiley Fairchild.

6. At no time did I discuss either case -- the *Boam Company* suit or the *Seymour* action -- with Wiley Fairchild, Carroll Ingram, or anyone representing Mr. Fairchild or any company in which he was involved. There was absolutely no connection in my mind between those cases and the oil interests I purchased from Mr. Fairchild.

7. I neither took any action nor failed to take any action in the *Boam Company* or *Seymour* cases because of the oil interests I purchased from Wiley Fairchild.

Under penalty of perjury, I declare that the foregoing statements are true and correct.

Walter L. Nixon, Jr.

Dated: Jan 25, 1989

STATE OF MISSISSIPPI
COUNTY OF HARRISON

AFFIDAVIT OF JOE SAM OWEN

Personally appeared before me the undersigned authority in and for the above mentioned jurisdiction the within named, Joe Sam Owen, who after being duly sworn on oath, does state as follows:

1. I am a practicing attorney and a partner in the law firm of OWEN, GALLOWAY & CLARK of Gulfport, Mississippi. I am licensed to practice in the State of Mississippi and admitted to practice in the state and federal courts of this state. My law practice since I went into private practice consist primarily of representation of personal injury claimants.

2. In September of 1979 I was retained by Jack N. Seymour, Jr. (hereinafter "SEYMOUR") to file a lawsuit seeking compensation for injuries he received in a construction accident while in the employ of L & A CONTRACTING COMPANY (hereinafter "L & A"). SEYMOUR was injured while working on a barge leased by L & A which was dismantling a bridge in Harrison County, Mississippi. I filed the original complaint on February 13, 1980 alleging several claims for relief against several defendants, including W.R. FAIRCHILD CONSTRUCTION COMPANY, LTD. (hereinafter "FAIRCHILD"). This complaint was amended on February 25, 1980 at which time an additional defendant was named and new allegations were made against all defendants. A copy of the original and first amended complaint are attached hereto and incorporated by reference as Exhibits "A" and "B" respectively. This civil action was filed in the United States District Court for the Southern District of Mississippi and is styled: *Jack N. Seymour, Jr. versus L & A Construction Company, et al.*, civil action no. S80-0274(N).

3. This case was originally assigned to U.S. DISTRICT JUDGE HAROLD COX who apparently declined the case after which it was reassigned to JUDGE DAN RUSSELL. JUDGE RUSSELL recused himself from the case because of his family relationship with a member of a law firm representing one of the defendants. It was then reassigned to the only remaining DISTRICT JUDGE available to preside in the case, JUDGE WALTER L. NIXON, JR.

4. On March 20, 1980 a separate civil action was filed by L & A et al, as owners pro hac vice/operators of the barge on which SEYMOUR was injured, seeking to limit its liability to the value of the vessel. This civil action is styled: IN THE MATTER OF L & A CONSTRUCTION COMPANY et al., civil action no. S80-0359(N). A copy of this complaint is attached hereto and incorporated herein as Exhibit "C". This civil action was consolidated with civil action no. S80-0274(N) by consent order of the Court on April 29, 1980.

5. On July 14, 1980 we filed a second amended complaint in the consolidation actions. This amended complaint alleged an eighth cause of action against L & A based on its failure to pay maintenance and cure and a ninth cause of action against all defendants, except BROWN ENGINEERING, as owners pro hac vice/operators of the barge. It sought relief under the Longshoreman and Harborworkers Compensation Act (33 U.S.C.A. 905(b)). A copy of this second amended complaint is attached hereto and incorporated herein as Exhibit "D".

6. During the process of discovery it became clear to us that FAIRCHILD was not responsible for SEYMOUR'S injuries. When George E. Morse advised me that he was going to file a motion for summary judgment on behalf of FAIRCHILD I told him that I would not oppose that motion. Mr. Morse did file such a motion and set it for hearing before Judge Nixon on September 3, 1980. We did not oppose this motion and on the day set for hearing the Court entered its judgment of dismissal of SEYMOUR'S claims against FAIRCHILD. The judgment of dismissal was, in my opinion, correct in law and

fact and there being no opposition to the motion by the plaintiff, it was the only ruling available to the Court.

7. During the pendency of the SEYMOUR action I was not aware of any relationship between Judge Nixon and FAIRCHILD. I am now aware that Judge Nixon purchased some oil and gas interests from Wiley Fairchild and/or W. R. FAIRCHILD CONSTRUCTION COMPANY and that he held these interest during the pendency of these civil actions. If I were asked to assume that these interests were purchased for fair value and that the purchase price was financed by FAIRCHILD at an interest rate of ten percent (10%), I would not expect Judge Nixon to recuse himself from presiding in the cases because of this relationship. Judge Nixon did not show any favoritism to FAIRCHILD, or any other party, in these proceedings.

8. In April of 1982 a verbal settlement was reached by the parties; the terms of the settlement were negotiated through the attorneys for the parties. The Court played no active part in this process, except to advise the parties to report back on the progress of settlement negotiations and then approval of the final settlement. The hearing on the proposed settlement was conducted by Magistrate John Roper on May 18, 1982. Since only Judge Nixon could enter dispositive orders, he signed the FINAL JUDGMENT on May 18, 1982.

WITNESS my signature this 26 day of January, 1989.

JOE SAM OWEN

SWORN TO AND SUBSCRIBED BEFORE ME, this 26 day of January, 1989.

NOTARY PUBLIC

My Commission Expires:

SEAL

STATE OF MISSISSIPPI
COUNTY OF HARRISON

AFFIDAVIT OF GEORGE E. MORSE

Personally appeared before me the within named, George E. Morse, who after being duly sworn, on oath, does state as follows:

1. I am a practicing attorney, licensed in the State of Mississippi and admitted to practice in both state and federal courts in the State of Mississippi. I am a member of the law firm of WHITE & MORSE of Gulfport, Mississippi. Our practice consist primarily of the defense of personal injury cases, representing insurance companies that have the liability coverage for named defendants in personal injury lawsuits.

2. In 1980 I was retained by HOME INSURANCE COMPANY to defend claims filed by Jack N. Seymour in the cases styled: Jack N. Seymour, Jr. v. L & A Contracting Company, et al. civil action nos. S80-0274 (N) and S80-0359(N), United States District Court, Southern District of Mississippi.

HOME INSURANCE COMPANY had the liability coverage on W. R. FAIRCHILD CONSTRUCTION COMPANY [hereinafter FAIRCHILD] which had been sued by Seymour along with several other defendants. The amount of liability coverage available to FAIRCHILD was FIVE HUNDRED THOUSAND DOLLARS ($500,000.00). FAIRCHILD had its own lawyer, Honorable Bruce Aultman of Hattisburg, Mississippi, who monitored our representation of his client because of exposure of FAIRCHILD to a judgement in excess of the policy limits.

3. Based on my review of the civil docket sheets and my file I can represent that this case was originally assigned to Honorable Harold Cox, now deceased, who reassigned it to

Honorable Dan Russell. Because of his family relationship with a member of our firm, Judge Russell recused himself as he did automatically in every case where our firm was representing a party . The case was then reassigned to the only remaining District Judge, Honorable Walter Nixon.

4. I was not aware of any relationship that existed between my client's insured, or its principal, Wiley Fairchild and Judge Nixon. If I was asked to assume that Judge Nixon had purchased an assignment of certain oil and gas interest from Wiley Fairchild or the insured and the transaction was for the fair market value of those interests then I would not expect Judge Nixon to recuse himself from presiding over the case.

5. In this litigation claims were asserted by the plaintiff, Mr. Seymour, and a co-defendant, BROWN ENGINEERING CO., against W. R. FAIRCHILD CONSTRUCTION CO. I filed on behalf of FAIRCHILD a motion for summary judgement as to the plaintiff's claims. This motion was unopposed by the plaintiff and on the day set for hearing I was instructed by Judge Nixon to draft the FINDINGS AND CONCLUSIONS of the Court and an ORDER dismissing the plaintiff's claims against FAIRCHILD. On September 3, 1980 the Court entered the FINDINGS AND CONCLUSIONS and the ORDER of dismissal that I had drafted.

6. Later, I filed a motion for summary judgement on behalf of FAIRCHILD seeking a dismissal of the cross-claim filed by BROWN ENGINEERING. After hearing arguments on this motion Judge Nixon overruled FAIRCHILD'S motion for summary judgement.

7. In May of 1982 this case was settled by the parties for a total of SIX HUNDRED SIXTY-FIVE THOUSAND DOLLARS ($665,000.00). My client, HOME INSURANCE CO., contributed ONE HUNDRED SIXTY-SIX THOUSAND, TWO HUNDRED AND FIFTY DOLLARS ($166,250.00) of the total settlement amount under

its obligation as the insuror of W.R. FAIRCHILD CONSTRUCTION COMPANY. Because of the amount of liability coverage on FAIRCHILD, the named defendant did not contribute any funds towards the settlement.

8. The hearing on the proposed settlement and agreed judgement of dismissal was set before Magistrate John Roper on May 17, 1982. The final Order of Dismissal was signed by Judge Nixon on May 18, 1982.

9. At no time in presiding over the case did Judge Nixon show any favoritism to my client's insured or to any party in the case.

GEORGE E. MORSE

SWORN TO AND SUBSCRIBED BEFORE ME on this the 24th day of ~~February~~ Jan, 1989.

Kathy L Allen

NOTARY PUBLIC

My Commission Expires:

7-13-90

SEAL:

AFFIDAVIT

I, George E. Morse, state as follows
(Print Name)

1. I am an attorney and represented a party litigant in the case of Jack N. Seymour, Jr. v. L & A Contracting Co., et al., Case No. S80-0274(N) in the Southern District of Mississippi. U. S. District Judge Walter L. Nixon, Jr. presided over this case, a personal injury matter in which W. R. Fairchild Construction Co. was a party defendant. Among the rulings by Judge Nixon in the case was a Judgment of Dismissal entered on September 3, 1980, granting summary judgment in favor of W. R. Fairchild Construction Co. as to the claim of the plaintiff Seymour. The case was resolved through settlement and dismissed by order of Judge Nixon on May 18, 1982. W. R. Fairchild Construction Co. contributed no money to the settlement, and as part of the settlement all claims against Fairchild were dismissed.

2. At no point in the proceedings of Case No. S80-0274(N) did Judge Nixon ever recuse himself because of any financial or personal relationship he may have had with Wiley Fairchild or W. R. Fairchild Construction Company, nor did he ever disclose any such relationship to the parties in the case.

I certify under penalty of perjury that the facts set forth in this affidavit are true and correct to the best of my knowledge; information and belief.

1/4/89
Date

Signature

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TO: The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee

RE: Procedures For Consideration Of House Resolution 407 Calling for Impeachment of Judge Walter L. Nixon, Jr.

DATE: April 14, 1988

This Memorandum will address several of the threshold issues which the Subcommittee must consider in connection with Resolution No. 407, calling for the impeachment of Judge Walter L. Nixon, Jr. Our discussion will focus on five major points:

1) Congress must undertake a full and independent review of the evidence concerning Judge Nixon, and may not rely upon the fact of his conviction as a basis for impeachment;

2) In view of the substantial grounds urged for vacating Judge Nixon's conviction in his pending motion under 28 U.S.C. § 2255, Congress should stay its action until the courts can consider whether Judge Nixon was convicted unconstitutionally;

e) In order to make good on one of their undisclosed promises to Wiley Fairchild, the federal prosecutors indicted his son on drug-smuggling charges to protect the son from a threatened five-year prison term in state court. Instead, due solely to the intervention of the federal prosecutors, Fairchild's son received only a six-month federal sentence for his role in a marijuana smuggling operation.

Congress should not reward these prosecutorial abuses. More important, Congress should not further punish the victims of those abuses, including Judge Nixon. This Subcommittee has a duty to investigate fully the initiation and conduct of the government investigation in this matter.

4. Under The Constitution, "High Crimes And Misdemeanors" Has A Narrow Meaning

Under the Constitution, Congress does not have unlimited discretion to impeach any civil officer on any grounds. The constitutional text confines impeachment to cases of "treason, bribery, or other high crimes and misdemeanors." Because the first two categories of crimes are not present here, the meaning of "high crimes and misdemeanors" is critical for deciding on Resolution 407.

According to Hamilton, impeachment applies to "those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself." The Federalist, No. 65. Again, Hamilton's words were echoed during the Claiborne debate when Sen. Evans observed that impeachment under English common law was confined to misconduct in office such as "misapplication of funds, abuse of official power, neglect of duty, encroachment on or contempt of legislative prerogatives, and corruption." 132 Cong. Rec. S16821 (Oct. 16, 1986).

The limited scope of the Impeachment Clause is established by two central events during the Constitutional Convention. On August 27, 1787, Mr. Dickinson presented a motion to allow removal of federal judges "on the application [by] the Senate and House of Representatives." 2 M. Farrand, Records of the Federal Convention 428 (1911). As Roger Sherman of Connecticut then pointed out, a similar provision allowed removal of English judges by "address" of the Houses of Parliament, id., and several state constitutions then contained similar provisions for removal of judges. See Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 Supreme Court Review 135. But Gouvernor Morris of New York objected that it "was fundamentally wrong to subject Judges to so arbitrary an authority," while James Wilson complained that

"Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt." 2 M. Farrand, supra, at 429. Randolph of Virginia also "opposed the motion as weakening too much the independence of the Judges." Id. at 428-29. Ultimately, Dickinson's motion commanded the support of only one state delegation, while seven states voted against it.

Two weeks later, George Mason of Virginia proposed to amend the Impeachment Clause to allow removal for "maladministration." Id. at 550. But Madison immediately protested: "So vague a term will be equivalent to tenure during pleasure of the Senate." Mason withdrew his motion and substituted the term "other high crimes & misdemeanors."

From these two episodes, it is clear that the Framers did not view the Impeachment Clause as creating an unbridled power to remove judges for any reason that might occur. Dickinson's proposal to permit removal through application was rejected as conferring too broad a power on Congress, while "maladministration" also was considered too broad a term for defining impeachable offenses.

Moreover, the limited meaning of "high crimes and misdemeanors" was illustrated when the Convention deleted that phrase in the extradition clause of one draft of the Constitution. The phrase was replaced by "other crime," in

Madison's words, "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited." Id. at 443. Indeed, just as Hamilton wrote in the Federalist, "high crimes and misdemeanors" was considered by Blackstone in 1757 to describe only a "political crime" or some action concerning improper administration of public office. See R. Berger, Impeachment, 61-62 (1973); id. at 86-93 (terms had a "limited" and "technical" meaning); Williams, supra, at 536 (the Framers "had a narrower view of impeachable offenses than their English forebears") (footnote omitted).

It is difficult to define "high crimes and misdemeanors" with precision. Nevertheless, it is essential for Congress to appreciate the constitutional limitations that the term places on the congressional impeachment power. These limits may be illustrated by the statement of Sen. Elihu Root in voting on the impeachment of Judge Robert W. Archbald in 1913. Sen. Root, joined by Sen. Henry Cabot Lodge, explained that he was voting in favor of six impeachment articles concerning Archbald's efforts to gain favors from railroad companies that appeared before his court, but "I have voted 'not guilty' upon the other articles, because while most of them involve improper conduct, I do not consider that the acts proved are high crimes and misdemeanors . . ." 49 Cong. Rec. 1448 (1913).

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February 16, 1989

By HAND

Hon. Don Edwards
Chairman
House Judiciary Committee
Subcommittee on Civil and
Constitutional Rights and Liberties
2307 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Edwards:

I enclose our Memorandum commenting on the December 19, 1988 decision of the District Court on Judge Nixon's motion to vacate his convictions. We have attempted to detail the major factual and legal errors in that opinion, which contains a surprising number of errors. As we explain in the Memorandum, the Subcommittee cannot rely on the District Court opinion in its deliberations.

Very truly yours,

David O. Stewart

David Overlock Stewart

DOS/paa

cc: Rep. Robert W. Kastenmeier
Rep. Jim Sensenbrenner, Jr.
Rep. John Conyers, Jr.
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MEMORANDUM REVIEWING THE DISTRICT COURT'S ERRORS ON JUDGE NIXON'S PETITION FOR POST-CONVICTION RELIEF

TABLE OF CONTENTS

Page

I. WILEY FAIRCHILD IS NOW A DEFENSE WITNESS....................6

II. THE DISTRICT COURT'S TORTUOUS PATH..........................13

- A. Incredible Credibility Findings.......................13
  - 1. During Wiley Fairchild's Plea Negotiations In Late 1984, The Prosecutor Promised To Help Drew Fairchild If He Could........................15
  - 2. Drew Fairchild's Plea Bargain Included The Prosecutor's Promise Not To Make A Sentencing Recommendation..................................18
  - 3. The Prosecution Memorandum On Drew Fairchild Was Not Privileged And Was Brady Material.........22
  - 4. The Testimony Of John Baltar Was Substantially Corroborated And Entirely Credible................24
    - (i) Baltar's assistance in preparing Wiley Fairchild's testimony.....................26
    - (ii) Pardon conversations with Weingarten.......27
    - (iii) Wiley Fairchild spoke to Weingarten about a pardon............................27
    - (iv) Barry Hess contradicts Baltar on only one point..................................28
    - (v) Little and Weingarten did not contradict Baltar's testimony that the government promised to help Drew Fairchild............29
    - (vi) Baltar's influence on Fairchild's testimony.................................29
    - (vii) Baltar's friendship.......................29
  - 5. The FBI Teletype of November 2, 1984 was Brady Material..30
  - 6. The Pardon Promises, Dismissal of Fairchild's Gratuity Charge, And The Scripts.................32

B. The Prosecutorial Abuses Were Sufficiently Material To Require That The Convictions Be Vacated............33

  1. The District Court Misstated The Trial Record.....34

    a. Setting Up The "Blackmail" Conversation At Fairchild's Office.............................34

    b. The Date Of The Blackmail Conversation And The Phone Call From Bud Holmes' Farm..........35

    c. Who Placed The Call To Wiley Fairchild?.......37

    d. What Was Said In The Phone Call?..............39

    e. How Did Judge Nixon Get To Holmes' Farm?......40

  2. The Inability To Impeach Wiley Fairchild Effectively Was A Fatal Blow To Judge Nixon's Defense...41

C. Presentation Of False Testimony.......................44

CONCLUSION...47

MEMORANDUM REVIEWING THE DISTRICT COURT'S ERRORS ON JUDGE NIXON'S PETITION FOR POST-CONVICTION RELIEF

In a 59-page opinion released on December 19, 1988, the District Court denied Judge Nixon's petition to vacate his convictions. Although such petitions are not often successful, the District Court's decision was surprising in view of several key factual developments during the post-conviction hearing in Jackson, Mississippi on August 29 and 30.

1. Wiley Fairchild, one of the two key witnesses against Judge Nixon, recanted critical parts of his trial testimony, admitting that his false trial testimony had been given in order to curry favor with the federal prosecutors. Fairchild now has recanted his trial testimony on both of the key dates in the case -- when Judge Nixon's investment was first raised and when the phone call from Bud Holmes' farm occurred. Fairchild now completely supports Judge Nixon's recollection on those points, and contradicts the theory of the charges against Judge Nixon.

2. Both Fairchild and his former aide, John Baltar, described an extended process by which the lead prosecutor shaped and molded Fairchild's testimony to include critical falsehoods against Judge

Nixon. This manipulation included the preparation, with the prosecutor's participation, of three scripts to help Mr. Fairchild learn his lies.

3. Both Wiley Fairchild and John Baltar testified -- without contradiction -- that during Fairchild's plea negotiations the lead prosecutor promised to do what he could to help Wiley's son, Drew. Since Wiley Fairchild's concern for Drew is at the root of this entire case, that promise was extremely important.

4. The lead prosecutor and the lawyer who represented Wiley and Drew Fairchild both testified that Drew Fairchild's plea negotiations in March 1985 included a promise by the prosecutor not to make any sentencing recommendation when Drew ultimately was sentenced. That promise was never disclosed to Judge Nixon during his trial.

5. The Justice Department memorandum recommending indictment of Drew Fairchild in March 1985 stated that the indictment was desired by Drew Fairchild "and his father" (emphasis added), and warned that a failure to indict Drew might "jeopardize the investigation" of Judge Nixon. One of the

prosecutors conceded that they were concerned that Wiley Fairchild would change his testimony unless the prosecutors granted the request that his son be indicted federally. This further favor to Wiley Fairchild was not disclosed during Judge Nixon's trial.

6. Several witnesses testified that the lead prosecutor stated that the charges against Wiley Fairchild might be dropped even after he pled guilty, and that the lead prosecutor also made clear that Fairchild's chance for a pardon depended on the prosecutor's recommendation.

7. An FBI teletype dated November 2, 1984 reported that Wiley Fairchild had stated that the phone call from Bud Holmes' farm occurred in December 1982 and had been placed by Bud Holmes. Those statements were directly inconsistent with Fairchild's trial testimony, but were never disclosed during Judge Nixon's trial.

Faced with Wiley Fairchild's recantation and this depressing pattern of the government suppressing key evidence, the District Court elected to close its eyes and stop up its ears. When Wiley Fairchild and John Baltar described horrendous prosecutorial overreaching, the District Court chose not to believe them. Slip op. at 23. When the lead prosecutor and defense counsel described a promise on Drew Fairchild's sentencing recommendation, the District Court chose not to believe them. Slip op. at 31. When the FBI teletype of November 2, 1984 described inconsistent statements by Wiley Fairchild, the District Court chose not to believe the FBI teletype. Slip op. at 33-34. And when Wiley Fairchild confessed to having lied at trial, the District Court threw up his hands and refused to believe it. Slip op. at 36.

When the District Court could not shut its eyes tight enough to keep out all of the disquieting facts, it sought refuge in legal holdings that are either wrong or totally without precedent. The Court ruled that the Justice Department memorandum in March 1988 was protected by the attorney work-product privilege, Slip op. at 34; that holding is absolutely wrong. The District Court ruled that the FBI teletype of November 2, 1982 did not have to be produced because it was not "reliable" evidence, id.; we have found no reported decision that ever has concluded that an FBI report of an inconsistent witness statement was insufficiently reliable to be produced to the defendant. And, in evaluating the materiality of all of these prosecutorial errors, the District Court misstated and mischaracterized the trial record on at least five critical facts, with each factual error making the case against Judge Nixon appear stronger than it really was.

This Subcommittee, however, has a constitutional duty to confront, not flee from, the uncomfortable facts. As the House Managers recently argued in Judge Hastings' case, the court rulings cannot control congressional deliberations. The House Managers told the Senate Rules Committee, "In both a legal and constitutional sense, the jury verdict is irrelevant to your decision regarding what procedures to recommend and to your ultimate decision whether to convict Judge Hastings on any of the Articles of Impeachment."

This Memorandum will detail the errors of the District Court. We will be arguing those errors to the Fifth Circuit Court of Appeals later this year. [1] But this Subcommittee must appreciate the central fact which emerges from the hearing last August in Jackson -- Wiley Fairchild now provides critical support for Judge Nixon, a development that leaves any charges against Judge Nixon totally dependent upon the credibility of Bud Holmes. [2]

---

[1] Thus, we will argue in this memorandum only the prosecutorial misconduct issue before the District Court. We have addressed the truthfulness of Judge Nixon's grand jury testimony in our previous submissions.

[2] We do not address in this Memorandum our contentions concerning a perjury trap, selective prosecution, vindictive prosecution and bad faith, which the District Court also denied. See Slip op. at 42-59. The District Court refused to allow any discovery on these issues and denied our request for an evidentiary hearing on those issues. With the claimant thus blindfolded, bound and gagged, the District Court concluded, not surprisingly, that the claims had not been proved. Because we still have been unable to explore the facts underlying these claims, we do not repeat them at this time.

I.

WILEY FAIRCHILD IS NOW A DEFENSE WITNESS

We have always insisted that even if the phone call from Bud Holmes' farm occurred in 1982, the charges against Judge Nixon cannot be sustained. But now one of the key supports for the charges against Judge Nixon -- the dating of that phone call -- has been demolished. Wiley Fairchild has finally disclosed that he lied on the dating issue at trial. Rodney Fairchild, Wiley's brother, has come forward with his recollection that the visit by Judge Nixon to the Fairchild offices on the day of the phone call occurred after Drew Fairchild's case was passed to the files in December 1982. And Judge Nixon steadfastly insists, as he always has, that the phone call occurred in 1983.

If the phone call occurred after Drew Fairchild's case was passed to the files in December 1982 and was returned from the files 30 days later, the charges against Judge Nixon crumble. If the phone call was in 1983, then (i) Judge Nixon indisputably had no impact on Drew Fairchild's case; (ii) by his own admission, Bud Holmes is a liar, Trial Tr. at 934-35, and his account of the events of that evening is largely fiction; and (iii) the utterly inconsequential nature of the events surrounding the phone call emerges clearly.

Fairchild's recantation on this point has great significance. The prosecutor repeatedly told the jury that the phone call had to have occurred before Drew's case was passed to the files because *both* Holmes and Wiley Fairchild said so. Trial Tr. Trial Tr. 1848, 1850, 1860-61, 1973-74. Fairchild's support on this point was central to the prosecution's attack on Judge Nixon's credibility.

The prosecutor read to the jury several pages of Mr. Fairchild's testimony (Trial Tr. 1845-49) and then claimed that "[t]his evidence contradicts Judge Nixon's testimony in three very significant ways." Trial Tr. 1848. Weingarten then cited facts which had been falsely stated by Wiley Fairchild at trial, that (*id.*) (emphasis added), "*this was a conversation that took place prior to the case being passed to the files*. *If Wiley is telling the truth here, Judge Nixon has testified to a series of falsehoods at this trial*, and if this is the case, you conclude he has done this, he's put together a story to meet the perjury charges."

Two pages later, the prosecutor again trumpeted Wiley Fairchild's credibility on the dating of the phone call. First, the prosecutor read a passage of Fairchild's testimony that we now know was an intentional falsehood to please Weingarten. Then the prosecutor asked several rhetorical questions (Trial Tr. 1850) (emphasis added):

> What's it to him [Wiley Fairchild] at this point in time? There is no hook into Wiley Fairchild, he's not being prosecuted for anything at this point. Was it not simply an effort by this man to give his best testimony? If you believe that, *if you believe Wiley Fairchild on that point, a crucial point we submit, it puts the lie to Judge Nixon's testimony*.

The prosecutor later again summoned Fairchild to support Bud Holmes on the date of the phone call. (Trial Tr. 1860-61) (emphasis added):

> Let's face it, I mean that is a dead square issue in this case. Judge Nixon testified unequivocally that the call took place in 83. Fairchild and Holmes testified unequivocally that the call took place in 1982. Somebody is flat out wrong. I suggest to you that Holmes and Fairchild on these three points put the lie to Judge Nixon's testimony.

In his rebuttal argument, Weingarten championed Fairchild's perjured testimony as the centerpiece of his case in a blistering attack on Petitioner's counsel (Trial Tr. 1973-74) (emphasis added):

> Then, of course, he [Mr. Fawer] talks about Wiley and how his brilliant cross-examination that afternoon he got Wiley to say my God, must have been after the case was passed to files, because for the first time I have laid out the scenario step by step. I don't recall if you recall, Mr. Fawer was strutting like a crow around the courtroom, Wiley Fairchild was exhausted, yawning, Mr. Fawer had scored a great victory, but the old man wouldn't give in. Immediately thereafter, and about twelve occasions he told Mr. Fawer, "no, I'm sorry. Not right. The case was passed to the file after the phone call." . . . . Fairchild wouldn't give in even to the great Michael Fawer. The old man is too tough, he threw him for a big loss, and he wouldn't yield.
>
> Why wouldn't he yield? He wouldn't yield because what Mr. Fawer was trying to elicit was not true.

Finally, Weingarten gambled his case on Fairchild's false testimony (Trial Tr. 1974) (emphasis added):

> I submit to you, ladies and gentlemen, the question in this case is whether or not it [the phone call] took place before the case was passed to the files or whether it took place after the case was passed to files. He [Mr. Fawer] stakes his case on the fact it took place after, we stake our case on the fact it went before.

The government's desperate clinging to Wiley Fairchild's credibility included memorable rhetorical questions: "Ask yourself, did he [Wiley Fairchild] have any motive to lie?," Trial Tr. 1839; "Ask yourself what motive in the world Wiley Fairchild would have to testify falsely about anything," Trial Tr. at 1840; and "Why would Wiley Fairchild say that if that didn't happen? Where is Wiley Fairchild's axe to grind here?" Trial tr. 1941. We now know that the prosecutor could ask those rhetorical questions without fear of contradiction because he had concealed all of the reasons for Wiley Fairchild to lie -- the promise to help Drew Fairchild, the pardon promises to Wiley Fairchild, the three scripts generated by the prosecution, and the rest.

Wiley Fairchild's recantation is all the more plausible because we now know of the prosecution's oppression and manipulation of Wiley Fairchild, which induced him to give false testimony. The key manipulation focused on Wiley's son, Drew, who was always Wiley Fairchild's most vulnerable spot. Both

Wiley Fairchild and John Baltar recalled that Wiley's plea negotiations in November 1984 included Fairchild's request that the federal government assist his son, Drew, if needed. They both recalled that the prosecutor promised to help Drew.

When the time came to redeem this promise in March 1985, the prosecutor kept his word. Drew Fairchild's counsel asked that Drew be prosecuted federally to head off the state prosecution. In their memorandum recommending federal indictment, the prosecutors stressed the importance of acceding to the Fairchilds' wishes in order to prosecute Judge Nixon: "To the extent that indicting Drew now is desired by both Drew and his farther, failure to do so could jeopardize the investigation." Jackson Ex. 5 As one prosecutor explained at the Jackson hearing, the deal with Drew was designed in part to ensure Wiley Fairchild's testimony against Judge Nixon (Jackson Tr. at 360-61):

> Q. Did you think they [Wiley and Drew Fairchild] were going to change their testimony if you did not indict Drew?
>
> * * *
>
> A. If there's a perception that witnesses who cooperate with the Federal Government will be punished, then the cooperation will be affected.
>
> Q. Does that mean they'll change their testimony?
>
> A. I suppose you could call it that.

Finally, the lead prosecutor promised Drew Fairchild's counsel that he would make no sentencing recommendation on

Drew. Jackson Tr. at 269-70, 287-88, 440. The prosecutor kept that promise, too, but the promise was never disclosed to Judge Nixon for his trial.

The prosecutors used other levers to keep Wiley Fairchild on the government "team." They said that, in some circumstances, the charges against Wiley Fairchild might be dropped even after he had pled guilty. Jackson Tr. at 249-51, 276-78, 377-78. The prosecutors also made clear to Wiley Fairchild that his chances for a pardon would hinge on the prosecutor's recommendation. Jackson Tr. 451-52. As late as last summer, just before he appeared before this Subcommittee, Mr. Fairchild was still trying to get the prosecutor to help him acquire a pardon. Jackson Tr. 102 (Baltar); 452-53 (Weingarten). All of these statements by the prosecutors carried great weight with the frightened, unlettered old man, and induced him to give false testimony at trial. Then, to make sure that Wiley Fairchild would not forget the trial testimony he had to give, the prosecutors participated in the preparation of three different scripts designed to reinforce the false dates in his mind.

But the prosecutors' script for Wiley Fairchild already was unraveling when he testified before this Subcommittee in July 1988. At that time, Wiley Fairchild recanted his trial testimony on the date when Carroll Ingram approached him concerning an investment by Judge Nixon. At trial, Fairchild had said the conversation occurred in late 1980, after the drug seizure at the

Hattiesburg Airport. That date had been fed to Fairchild by the prosecutors to establish their theory that Judge Nixon was shaking down Wiley Fairchild. Jackson Tr. 213-14. But Fairchild told this Subcommittee that his trial testimony was wrong, and that the approach occurred in 1979, exactly as Carroll Ingram and Judge Nixon testified. Cong'l Tr., 7/7/88, at 64-65.

At the Jackson hearing, the script came completely undone. The truth, so long submerged by the force of the prosecutors' will, began to shine through.

II.

THE DISTRICT COURT'S TORTUOUS PATH

The District Court's decision was achieved through two basic judicial gambits: (A) disbelieving all evidence supporting Judge Nixon, or distinguishing such evidence through unsupported findings of Facts and wrong legal holdings; (B) presenting an erroneous rendition of the trial record which distorted the materiality of these errors. The District Court used those same gambits to deny relief even though Judge Nixon's conviction now has been proved to be based on false evidence.

A. Incredible Credibility Findings

The District Court announced with great emphasis that it did not believe the testimony of Wiley Fairchild or John Saltar, and also did believe the testimony of every witness, even Reid Weingarten, when that testimony supported Judge Nixon. Slip op. at 22-23. The District Court also listed all of the witnesses he believed, noting those portions of their testimony that he believed -- which turned out always to be when the witnesses supported the government's position. Id. at 24. These credibility "findings" call to mind the words of Poincare, the French mathematician: "To doubt everything or to believe everything are two equally convenient solutions; both dispense with the necessity of reflection."

The District Court's factual and credibility "findings," however, do not withstand scrutiny. The District Court repeatedly cited testimony that supposedly contradicted Fairchild and Baltar when, in fact, the cited testimony concerned another subject entirely. The District Court gave no weight whatever to the abundant evidence, both testimonial and documentary, that corroborated Fairchild and Baltar. And on those points where government witnesses or government documents supported Judge Nixon's position, the District Court chose not to believe that government testimony or documentary evidence.

Indeed, the District Court's fact-finding sometimes more nearly resembled name-calling. The District Court found Wiley Fairchild "self-contradictory, puzzling and incredible!" Slip op. at 22. The Court called him a "pathetic figure" who was "not worthy of belief." *Id.* Fairchild and Baltar were jointly condemned as "not trustworthy or credible," and the Court intoned that neither "by manner or appearance on the witness stand, indicate[d] any innate understanding of truthfulness." *Id.* at 23.

The District Court acknowledged but never met our challenge: to find some motive for the testimony of Wiley Fairchild and John Baltar at the Jackson hearing beyond a simple regard for the truth. Neither man had anything to gain by testifying about the prosecutors' overreaching and undisclosed promises. Wiley Fairchild plainly risked criminal liability by confessing his perjury, while John Baltar also was at risk for his role as the prosecutor's instrument for manipulating Fairchild's testimony. No one -- and surely no one who survived the Hattiesburg grand jury -- would welcome the opportunity to anger federal law enforcement officials by describing their abuses. The District Court never explained why Wiley Fairchild and John Baltar would fabricate testimony to court such danger. Instead, the Court reasoned, "Obviously, the Court rejects this argument." Slip op. at 23.

When each key fact is examined, however, it turns out that the testimony of Fairchild and Baltar is largely corroborated. The District Court's factual and legal findings, however, were often very wrong.

1. During Wiley Fairchild's Plea Negotiations In Late 1984, The Prosecutor Promised To Help Drew Fairchild If He Could

Baltar testified that during Wiley Fairchild's plea negotiations in November 1984, prosecutor Weingarten "said that he would be glad to help him [Drew] and that he would help with his [Drew's] charges if the State gave us much problems with it." Jackson Tr. 43. Baltar explained that help for Drew "was part of the negotiation" with the prosecutor. "In other words, Mr. Fairchild wanted help for Drew in addition to dismissing counts on him." Id. Wiley Fairchild confirmed that during plea conversations in late 1984, he asked the prosecutor to help Drew and Weingarten responded that "he would do what he could." Tr. 203. Fairchild said that this promise was important to his decision to accept the plea bargain. Id. As one prosecutor noted, "the entire case had really been about Wiley's concern about his handling of his son's case." Jackson Tr. 346.

Despite the undisputed testimony of Fairchild and Baltar on this point, the District Court held, "[t]he government did not promise Wiley Fairchild, as a part of his plea agreement, that it would do what it could to help Drew in dealing with the drug charges against him. (E.H. Tr. at pp. 285-86, 340, 346-347, & 389-390)." Slip op., at 30 (emphasis added). That holding is totally without factual basis. It is alarming to review each of the District Court's record citations on this point, for none of the references supports the Court's holding.

> Jackson Tr. 285-86 -- Barry Hess, counsel for both Wiley and Drew, testified that Drew Fairchild's plea agreement in March 1985 was not part of Wiley Fairchild's plea agreement in late 1984. That is true, but beside the point. When Wiley Fairchild made his plea bargain in November 1984 he did not know that he would later ask that his son be indicted by the federal government; in that sense, Drew's eventual plea agreement four months later was not "part of" Wiley's plea agreement. But Hess's testimony in no way contradicts the testimony by Fairchild and Baltar that the prosecutor secured Wiley Fairchild's cooperation, in part, by promising to do what he could to help Drew Fairchild. Moreover, neither Wiley Fairchild nor Baltar suggested that Barry Hess was

present when the prosecutor promised in November 1984 to help Drew.

Jackson Tr. 340, 346-47 -- Prosecutor Jan Little testified that in March 1985 and thereafter she did not know of any discussion with Wiley Fairchild of Drew's prosecution, although "it was, you know, sort of understood that Wiley did not want his son's case to be mishandled." Her testimony has nothing to do with Weingarten's promises in late 1984.

Jackson Tr. 389-90 -- Reid Weingarten testified that in March 1985 there was no direct communication with Wiley Fairchild concerning Drew's indictment. But when Mr. Weingarten later was asked whether he had, during Wiley's plea negotiations in late 1984, promised to help Drew, he said, "I can see how someone hearing what I said to [Wiley's lawyer] perhaps could have interpreted my words" as making such a promise. Jackson Tr. 423-24. Even more surprising, in view of the District Court's "finding," is Weingarten's ultimate admission that he talked to Wiley about Drew, and that he could not deny promising Wiley that he would do what he could to help Drew. Jackson Tr. at 427-28.

Consequently, the District Court's "finding" on Wiley Fairchild's plea negotiations in late 1984 was based exclusively upon testimony concerning Drew Fairchild's plea negotiations in March 1985. Relying solely on testimony concerning events in March 1985, the District Court rejected as incredible the uncontradicted testimony by two witnesses concerning events in November 1984 -- the equivalent of holding that the atomic bomb did not fall on Nagasaki in August 1945 because we know that no atomic bomb fell on Nagasaki in November of 1945.

2. Drew Fairchild's Plea Bargain Included The Prosecutor's Promise Not To Make A Sentencing Recommendation

Immediately before Judge Nixon's trial, his counsel pressed the prosecutor for full disclosure of the terms of the plea agreement with Drew Fairchild in March 1985. The prosecutor wrote a letter in response, dated January 7, 1988, that was seriously incomplete, failing to mention that the prosecutor had promised not to make a sentencing recommendation on Drew. Jackson Ex. 7 ("No agreements, deals, or promises were made"). Such a promise can be an important concession in plea bargaining, since the sentencing court ordinarily is very interested in the prosecutor's sentencing recommendation and often follows it.

At the Jackson hearing, both prosecutor Weingarten and defense counsel Hess testified that such a promise was made and was part of the plea bargain. Jackson Tr. 269-70, 287-88 (Hess), 440 (Weingarten). The District Court twisted and turned desperately to avoid the plain implications of this undisputed fact.

First, the District Court announced that there is "no indication in the record that Drew or Wiley was informed of or knew about this statement." Slip op. at 31. The District Court's statement is wrong. When government counsel questioned Hess about Wiley Fairchild's involvement in Drew Fairchild's plea agreement, Hess replied, "I'm sure I kept Wiley informed. I mean, Drew is Wiley's son. Wiley is the one that asked me to represent him [Drew]. And I'm sure that as things developed on Drew's case that Wiley was kept informed. But do I have a specific recollection as to specific conversations, I don't." Jackson Tr. 285

The District Court then wrote that "[e]ven though both Hess and Weingarten described this statement as a promise," the Court "does not believe that this statement was a true plea bargain promise." Slip op. at 31. It is difficult to imagine what more could be shown to persuade the District Court that a true plea bargain promise had been made: (i) the prosecutor and defense lawyer were involved in plea bargaining; (ii) the prosecutor promised to make no recommendation at sentencing. Despite these uncontradicted facts, the District Court was not willing to believe the testimony of the two lawyers involved.

The District Court then compounded its erroneous factual finding by offering a flat legal error as an alternative holding, stating that the prosecutor's promise on sentencing "has little significance" and "does not rise to the level of a promise for Brady purposes." Slip op. at 31. Under Brady v. Maryland, 373 U.S. 83 (1963), a defendant is entitled to receive all favorable evidence in the possession of the prosecution, including evidence that would impeach prosecution witnesses. United States v. Bagley, 105 S.Ct. 3375 (1987). The courts have uniformly held that evidence of a witness' plea bargain with the prosecutor is covered by Brady. Giglio v. United States, 405 U.S. 150, 154-55 (1972); DeMarco v. United States, 415 U.S. 449 (1974); United States v. Iverson, 637 F.2d 799, 803 (D.C. Cir. 1980) (footnote omitted) ("In practical experience, few, if any, factors are more likely to induce an accused to testify, possibly falsely, against another, than the expectation of prosecutorial or sentencing leniency"); Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986); United States v. Higgs, 713 F.2d 39, 42-43 (3d Cir. 1983), cert. denied sub nom. Kemp v. United States, 464 U.S. 1048 (1984).

The District Court's pronouncement that the prosecutor's promise not to make a sentencing recommendation "has little significance" is contradicted by numerous court rulings, by experienced criminal law practitioners, and by the United States Department of Justice. According to the U.S. Attorneys' Manual published by the Justice Department to assist its prosecutors, when negotiating a plea bargain "[a]mong the options are: taking no position regarding the sentence. . . ." Vol. 8, § 9-27.420, p. 9-989 (1988 Supp.). Indeed, that option is expressly recognized under Rule 11(e)(1)(B) of the Federal Rules of

Criminal Procedure and in numerous court decisions. United States v. Gray, 611 F.2d 194, 198 & n.4 (7th Cir. 1979), cert. denied, 446 U.S. 911 (1980); United States v. Avery, 621 F.2d 214, 215 (5th Cir. 1980), cert. denied, 450 U.S. 933 (1981); United States v. Voccola, 600 F. Supp. 1534 (D.R.I. 1985). Moreover, standard texts on criminal law and plea bargaining all recommend that defense counsel attempt to secure such a promise from prosecutors. Allen, Rosen & Winston, "Guilty Pleas and Plea Bargaining," in 2 S. Arkin, et al., Business Crime, ¶ 5.04, p. 5-67 (1988) (defense counsel should seek stipulated sentence or "to have the prosecutor . . . at least to remain silent before the court on the subject of sentence"); 2 D. Rossman, Criminal Law Advocacy, ¶ 8.03, p. 8-38 (same).

The promise on Drew's sentencing recommendation takes on greater significance in the full context of the case. Wiley Fairchild wanted the prosecutors to help Drew, and the sentencing recommendation for Drew cemented the government's bond with Wiley, fulfilling the earlier promise to help Drew. And while Judge Nixon was accused of trying to help a drug smuggler (Drew) avoid a jail sentence, it turns out that the federal prosecutors were actively engaged in precisely that effort by promising not to make a sentencing recommendation. 3/

3/ Perhaps recognizing the lack of support for its factual and legal holdings on this point, the District Court stated that the entire episode was not "material" to Judge Nixon's conviction anyway. Slip op. at 31. We address this catchall argument below. See pp. 33-42, infra.

3. The Prosecution Memorandum On Drew Fairchild Was Not Privileged And Was Brady Material

The District Court ruled that the March 1985 prosecution memorandum was "the work-product of government attorneys which was exempt from discovery at [Judge Nixon's] trial. See Fed. R. Crim. P. 16(a)(2)." Slip op. at 34. That holding is wrong.

The prosecution's Brady obligation to produce exculpatory and impeaching information is based on the Due Process Clause of the Constitution, and cannot be evaded through assertions of privilege, as the Advisory Committee on the federal rules stated in 1974 when Rule 16(a)(2) was approved in its current form. The Advisory Committee noted that the amended rule exempted work-product material from discovery in criminal cases, except for Brady material: "Brady v. Maryland, 373 U.S. 83 . . . (1963), requires the disclosure of evidence favorable to the defendant. This is, of course, unchanged by this rule." (Emphasis added.) As the Court held in United States v. DeMarco, 407 F. Supp. 107, 111 at n.2 (C.D. Cal. 1975), "[t]he very purpose of Brady was to make clear that the due process clause compels the production of material not otherwise discoverable." See Wright & Miller, Federal Criminal Procedure, § 254, p. 81 ("the work-product immunity for discovery in Rule 16(a)(2) prohibits discovery under Rule 16 but it does not alter the prosecutor's duty to disclose material that is within Brady"); United States v. Leichtfuss, 331 F. Supp. 723, 735 (N.D. Ill. 1971); United States v. Westmoreland, 41 F.R.D. 419, 427-28 (S.D.

Ind. 1967); cf. Goldberg v. United States, 425 U.S. 94, 106-07 (1976) (rejecting claim that work-product privilege exempted material from disclosure under Jencks Act).

The District Court also claimed that the prosecution memorandum "does not contain reliable evidence favorable to [Judge Nixon]." Slip op. at 34. The prosecution memorandum disclosed the following essential information favorable to Judge Nixon:

(i) That Drew Fairchild's lawyer expressly sought federal indictment to bar the state prosecution of Drew;

(ii) The government's first strategic consideration in indicting Drew Fairchild was: "We need the cooperation of Drew and his father, Wiley, in prosecutions of . . . Judge Nixon. To the extent that indicting Drew now is desired by both Drew and his father, failure to do so could jeopardize the investigation;"

(iii) The government knew that indicting Drew would be "a favor to him," and wanted to conceal that favor by minimizing the nature of the plea agreement.

It cannot seriously be argued, as the District Court stated, that such information was not favorable to Judge Nixon. Armed with this information, Judge Nixon's counsel could have cross-examined Wiley and Drew Fairchild far more effectively, and he could have answered the prosecutor's rhetorical questions as to what motive Wiley Fairchild had to curry favor with the government. See pp. 6-9, supra. The memorandum also reveals that it was the federal prosecutors, not Judge Nixon, who intervened to help Drew Fairchild at his father's request. As was the case in Lindsey v. King, 769 F.2d 1034, 1042 (5th Cir. 1985), "We can say, however, on the basis of our courtroom experience, that the evidence withheld by the prosecutor in today's case carried within it the potential both for the destruction of [the witness's testimony] and the discrediting, in some degree, of the police methods employed in assembling the case against him."

4. The Testimony Of John Baltar Was Substantially Corroborated And Entirely Credible

The District Court chose to disbelieve all testimony by John Baltar. In so doing, the District Court ignored the extensive corroboration for the key parts of Baltar's testimony. Among those central points were:

(a) The prosecutor promised during Wiley's plea negotiations in November 1984 to do what he could for Drew Fairchild, see pp. 14-17, supra.

(b) The prosecutor instructed Baltar to assemble a script for Wiley Fairchild to study before he testified in the grand jury in November 1984. Jackson Tr. 52-55 (Baltar); 435-36 (Weingarten); 271-72 (Hess). The script itself was introduced (Jackson Ex. 18) along with two other documents in prosecutor Weingarten's handwriting that were designed to help Fairchild learn his testimony (Jackson Ex. 22, 22A, 23).

(c) Before the November 1984 plea agreement, the Fairchild camp inquired whether the gratuity charge could be dropped after the agreement was reached, and the prosecutor responded that although such an outcome was unlikely, it could happen. Jackson Tr. 45-46 (Baltar); 250-51 (Hess); 378 (Weingarten).

(d) The decision by Wiley Fairchild to plead guilty was based largely on his attorney's statement that, if he were convicted, he would not get bond pending appeal. Jackson Ex. C-2, ¶ 6 (Baltar); 248-49 (Hess).

(e) The inquiry by the Fairchild camp concerning a pardon for Wiley Fairchild, and the prosecutor's response that a pardon would turn in large part on the prosecutor's recommendation. Jackson Tr. 105-07 (Baltar); 228 (Fairchild); 378-80 (Weingarten).

(f) The attempt to induce a federal prosecution of Drew Fairchild in March 1985. Jackson Tr. 57-58 (Baltar); 267-68 (Hess).

(g) Prosecutor Weingarten wanted to delay Wiley Fairchild's sentencing until after Judge Nixon's trial. Jackson Tr. 262 (Hess); 59-60 (Baltar).

Even though Baltar was corroborated on these important points (and many others), the District Court professed to find a number of inconsistencies in his testimony. Most of the supposed inconsistencies, however, are either based on a misunderstanding of the facts or are not significant.

(i) Baltar's assistance in preparing Wiley Fairchild's testimony -- The District Court expressed alarm that Baltar supposedly admitted preparing Wiley Fairchild to testify falsely. Slip op. at 21-22. But Baltar made no such statement; he testified only that he prepared Wiley Fairchild to testify to what Weingarten said was the truth. Weingarten told them that "some of the things" Wiley had said in his proffer on November 1, 1984 "were not accurate and that in order to be able to get a plea Mr. Fairchild was going to have to remember that certain things happened at certain times, different times from what he actually had in his mind." Jackson Tr. 36-37. In fact, Weingarten instructed Baltar to teach Wiley certain dates and events, Jackson Tr. 47-55, 64-71, 159, (Baltar); 435-36 (Weingarten), but Baltar had no reason to know that he was teaching Fairchild lies. As Baltar said, he "had no opportunity to know the truth" because he had not worked for Fairchild when the various events occurred. Jackson Tr. 81-82; see also id. 30, 39, 48, 186-87. Baltar instructed Fairchild on the facts provided by Weingarten which Baltar reasonably believed the government knew to be true. Id.

(ii) Pardon conversations with Weingarten -- The District Court claimed that Baltar's written statements inconsistently identified different dates on which he talked to Weingarten about a pardon for Wiley Fairchild. Slip op. at 22. But Baltar explained at the Jackson hearing that he had such conversations with Weingarten on both occasions noted in his written statements, Jackson Tr. 101-05, and Weingarten confirmed that there were many such discussions. Id. 451. There is no inconsistency. [4]

(iii) Wiley Fairchild spoke to Weingarten about a pardon -- The District Court held that Baltar testified that Wiley Fairchild never spoke to Weingarten about a pardon, but that Fairchild claimed that he "personally talked to Weingarten" about a pardon. Slip op. at 22 (item (2)). The alleged discrepancy is minute. In answering the question whether Weingarten had ever said that Fairchild must testify a certain way in order to get a pardon, Baltar explained that he did not recall that express threat. Jackson Tr. 108. Fairchild's statement that he talked about the possibility of a pardon with Weingarten does not contradict Baltar. Wiley said that Baltar was present during that conversation and may even have brought up the subject of a pardon. Jackson Tr. at 209, 225. Thus, Fairchild described a conversation that was primarily between Baltar and Weingarten, which is consistent with Baltar's testimony that he did not know of a pardon conversation solely between Fairchild and Weingarten. Wiley evidently was describing a three-person pardon conversation while Baltar said that he did not know of a two-person pardon conversation involving only Wiley Fairhcild and Weingarten. Both statements are uncontradicted.

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[4] Further, as Baltar mentioned prior to any cross-examination, his first written statement was prepared in haste on a day that he was "pretty sick." Post-Hearing Tr. 91.

(iv) Barry Hess contradicts Baltar on only one point -- The District Court found that Barry Hess contradicted Wiley Fairchild and Baltar on three points: whether "there was a promise by the government that it might dismiss the gratuity charge, whether Petitioner's Exhibit No. 17 is [accurate] . . . and whether Weingarten promised to help Drew Fairchild." Slip op. at 22. But Hess confirmed Baltar on the first point -- the prosecutor's statement that the gratuity charge might be dropped, see p. 23, supra, and Hess in no way contradicted Baltar on the third point, Weingarten's promise to help Drew Fairchild, see pp. 14-17, supra. Only on the second point (the handwritten note on Exhibit 17 that Weingarten said he might drop the gratuity charge against Wiley) did Hess contradict Baltar and claim that Baltar's contemporaneous notes were inaccurate. On that point, the District Court chose to credit Hess's self-serving testimony about the message he sent to his client rather than the written document and the testimony of Baltar and Fairchild.

(v) *Little and Weingarten did not contradict Baltar's testimony that the government promised to help Drew Fairchild* -- *See* pp. 14-17, *supra*.

(vi) *Baltar's influence on Fairchild's testimony* -- The District Court purported to find an inconsistency between Baltar's statement that he did not know whether Wiley Fairchild's testimony was true or false, and Wiley's statement that Baltar influenced his testimony. Again, there is no contradiction. Baltar did not know the true facts about Judge Nixon's investment or the Drew Fairchild case, but he freely admitted coaching Wiley to testify according to the facts stated by Weingarten. *See* pp. 23-25, *supra*. That coaching surely was intended to influence Wiley Fairchild's trial testimony, and did.

(vii) *Baltar's friendship* -- The District Court observed that Baltar initially denied any friendship with Judge Nixon, but later admitted to the existence of a friendship. Slip op. at 23 (item (8)). The District Court's presentation is not balanced. Baltar volunteered on direct examination that he knew Judge Nixon. Jackson Tr. 27. Baltar was asked on cross-examination if "Judge Nixon's a good friend of yours?" *Id*. Tr. 76. Baltar said no, he never had occasion to be a good friend of Judge Nixon. Following a reference to his 1984 grand jury testimony, in which Baltar noted "[t]he Judge and I are good friends," Baltar explained that his and Judge Nixon's families have known each other for years and the two speak when they meet, but don't ever associate. Id. at 79. There is no material inconsistency in Baltar's testimony on this point.

No witness gives perfect testimony, remembering everything exactly right. But the District Court's decision totally to ignore Baltar's testimony is contrary to the record evidence that his statements were largely accurate and were not motivated by self-interest. If the Subcommittee has any doubt about Baltar's credibility, it should hear him testify in person.

5. The FBI Teletype of November 2, 1984 Was Brady Material

On November 1, 1984, Wiley Fairchild met with federal prosecutors and provided a tape-recorded "proffer" of his testimony as part of the plea-bargaining process. On the following day, the FBI Jackson office sent a teletype to Washington reporting, inter alia, that Wiley stated (1) that the phone call from Holmes' farm occurred in December 1982, and (2) that Bud Holmes placed the telephone call. Jackson Ex. 20. These statements, made before the prosecutors manipulated Fairchild's testimony, would have provided powerful ammunition for cross-examining Fairchild when he gave different trial testimony. The FBI teletype also would have damaged Bud Holmes' credibility, since he gave inconsistent testimony on those points. But the FBI teletype was not provided to Judge Nixon before trial.

The District Court held, first, that the statements in the FBI teletype were wrong, and that FBI Agent Kenneth White-Spunner, a seasoned agent with many years with the Bureau, just got the story wrong when he drafted the teletype. The District Court noted that the reported statements by Fairchild were not made during the tape-recorded portion of the proffer on November 1, Jackson Ex. 12, but never admits the possibility that the statements might have been made before or after the tape recorder was running. Compare Jackson Tr. 35 (Baltar); 190-95 (Wiley Fairchild). The District Court concluded that the teletype "does not contain reliable evidence favorable to Petitioner and it did not constitute Brady material." Slip op. at 34 (emphasis added).

The District Court's holding is unprecedented. We have found no reported decision holding that the prosecution can withhold Brady material by claiming it was insufficiently "reliable." Indeed, such a holding would completely undermine the Brady doctrine -- and the due process values it protects -- by permitting suppression of exculpatory or impeaching material that is deemed insufficiently "reliable." Almost by definition, the prosecution always has concluded that Brady material is unreliable; if the prosecution thought the exculpatory or impeaching material were reliable, the criminal charges would not have been brought. The District Court's novel Brady doctrine would eviscerate the due process protections announced in Brady.

The purpose behind Brady is "to ensure that a miscarriage of justice does not occur. Bagley v. United States, 473 U.S. 667, 675 (1985). As Chief Justice Warren wrote in Napue

v. Illinois, 360 U.S. 264, 269 (1959), "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Judge Nixon was entitled to the impeaching statements in the FBI teletype.

6. The Pardon Promises, Dismissal Of Fairchild's Gratuity Charge, And The Scripts

The District Court dismissed as insignificant the conversations between the Fairchild camp and the prosecutor concerning a pardon and concerning possible dismissal of the gratuity charge against Wiley Fairchild after he pled guilty. Slip op. at 30, 32. The evidence that the prosecutor had participated in preparing three scripts for Wiley Fairchild's testimony was similarly dismissed by the District Court. Id. at 39-42.

Rather than repeat our contentions on these points, we wish only to note the District Court's technique for isolating each uncomfortable fact from every other uncomfortable fact, and then denigrating each individual event as insignificant. This technique is a fine method for winning debating points, but it is poor method for finding the truth. To appreciate how Judge Nixon was convicted, one must step back and view the breadth of the prosecutors' manipulation of Wiley Fairchild with promises, elliptical statements, hard pressure, testimonial scripts, winks, nods, and -- finally and most importantly -- help for his son.

The District Court managed to miss that big picture completely, flitting from one piece of the puzzle to the next without recognizing the oppression and injustice that is revealed when the pieces are assembled. This Subcommittee, we hope, will not avert its eyes from the larger picture.

B. The Prosecutorial Abuses Were Sufficiently Material To Require That The Convictions Be Vacated

At several points in its opinion, the District Court announced that even if Judge Nixon's rights were deprived by a particular prosecutorial abuse, the abuse was not sufficiently "material" to the jury verdicts to justify granting relief. See Slip op. at 31 (promise to help Drew); id. (promise to make no sentencing recommendation for Drew); id. at 34 (prosecutors' memorandum concerning Drew Fairchild), id. at 35 (false testimony concerning date when Carroll Ingram first approached Wiley Fairchild concerning investment). This "catchall" holding flows from two rhetorical devices. First, as noted above, the District Court never considered the cumulative impact of all of the abuses on the fairness of the trial, but considered them one at a time, in isolation, thereby reducing their impact.

Second, the District Court misstated the evidence at trial. In purporting to recite that evidence, the District Court repeatedly ommitted conflicts between the testimony of Bud Holmes and other witnesses, while magnifying minor inconsistencies between Judge Nixon's testimony and the statements of others. The District Court largely ignored the extensive support for Judge Nixon's testimony provided by Carroll Ingram, and the critical points on which Ingram contradicted Bud Holmes. Through many small misstatements of the record, the District Court exaggerated the strength of the evidence against Judge Nixon, thus making it more difficult to establish materiality.

We attempt to restore that balance below, first reviewing the District Court's misstatement of the trial record; when those misstatements are corrected, the evidence against Judge Nixon is accurately described as equivocal, at most. Then we will explain that the prosecution's abuses deprived Judge Nixon's counsel of powerful impeachment material that could well have brought an acquittal by revealing the falsehoods that Fairchild has now admitted he told.

1. The District Court Misstated The Trial Record

a. Setting Up The "Blackmail" Conversation At Fairchild's Office

There is no question that Judge Nixon met with Wiley Fairchild at the Fairchild offices and Fairchild complained that Bud Holmes was blackmailing him. The District Court correctly notes that Fairchild and Judge Nixon disagree on how that meeting was set up. Slip op. at 18-19 (item (2)(b)). Fairchild said he asked Carroll Ingram to have Judge Nixon come to the office, and that Ingram and Judge Nixon both came to the office that day, Trial Tr. 481; Judge Nixon recalled dropping by Fairchild's office as a social call, and testified that Ingram had no involvement in the visit whatever, id. at 1532.

The District Court completely ignored Carroll Ingram's testimony on these facts, even though Ingram fully confirms Judge

Nixon's recollection. Ingram testified that he arranged an earlier meeting between Fairchild and Judge Nixon, which occurred some time after Wiley and Judge Nixon had an agreement on an investment. Ingram was present at that earlier meeting. Trial Tr. 1125-26, 1152; Cong'l Tr., 7/8/88, at 178-79, but this was the only meeting between Wiley and Judge Nixon that Ingram recalls arranging. Trial Tr. 1152.

Ingram's recollection of these facts fits with Judge Nixon's, and is consistent with common sense. Judge Nixon recalled that after Wiley Fairchild agreed to sell him mineral interests, Ingram told him that Fairchild would like to meet him. Trial Tr. 1486. Nixon agreed. Id. Ingram was present at this first meeting, Judge Nixon explained, although they both drove to the meeting separately. Trial Tr. 1486-88, 171-72. But neither Ingram nor Judge Nixon supported Fairchild's recollection that he asked Ingram to have Judge Nixon come to his office for the later "blackmail" conversation. Since Fairchild believed that Ingram might be involved in the blackmail, it is highly unlikely that he asked Ingram to bring Judge Nixon to the meeting at which he raised the blackmail allegation.

b. The Date Of The Blackmail Conversation And The Phone Call From Bud Holmes' Farm

The District Court asserted that Wiley, Ingram, and Holmes agreed that the blackmail conversations took place before Drew's case was passed to the files, contrary to Judge Nixon's recollection. Slip op. at 18-20 (items (2)(a), (4)(a), (5)(a), (6)(a)). But only Holmes has steadfastly asserted that the

Nixon's recollection. See Slip op. at 20 (item (6)(b) says that Ingram confirms Holmes' version).

Holmes claimed that Judge Nixon "placed" the telephone call to Fairchild. Fairchild never testified that Judge Nixon initiated the phone call, but only that Judge Nixon "got on" the phone with him, or spoke with him, first. Trial Tr. 485, 529, 719. In fact, Wiley's initial statements on the matter were that Holmes made the call. As Baltar recalls and as government records indicate, in early November 1984 Fairchild indicated that Holmes placed the call and Judge Nixon was on an extension. Jackson Tr. 31, Jackson Ex. S & T; Jackson Ex. 20. Further, Fairchild has since testified that he does not recall whether he or his wife answered the telephone; he thus cannot know who placed the call. Cong'l Tr. 7/7/88, at 46. Judge Nixon's recollection, that Holmes simply handed him the telephone with Fairchild already on the line, is entirely consistent with Fairchild's testimony that he spoke with Judge Nixon first; Holmes may well have dialed the call, spoken to Wiley's wife, asked to speak with Wiley, and, before Wiley got on the line, handed the phone to Judge Nixon.

Ingram informed this Subcommittee that Holmes told him that he (Holmes) had been drinking the night of the call to Fairchild and that he (Holmes) had decided to call Wiley. Cong'l Tr., 7/8/88, at 257.

d. What Was Said In the Phone Call?

The District Court claimed that Wiley Fairchild and Bud Holmes agreed on the content of Judge Nixon's conversation with Wiley Fairchild, contradicting Judge Nixon. Slip. op at 19-20 (items (2)(d), (4)(g), (5)(c). Again, Fairchild actually provided considerable support for Judge Nixon and contradicted Holmes.

Fairchild confirmed Judge Nixon's recollection that the conversation was short and did not involve any mention of Drew's case. Rather, according to Wiley, Judge Nixon said only "Wiley, you know that man we was talking to [sic] this evening? I said yeah. He said well, I'm in his home, and everything going to be taken care of to your satisfaction. I says thank you, I appreciate that." Trial Tr. 485. According to Fairchild, then, Judge Nixon made no mention of Drew's case, referring only to the blackmailing allegation that Fairchild had made earlier that day.

Fairchild also never corroborated Holmes' claim that Judge Nixon thanked Wiley on the phone for the oil and gas investment, allegedly telling Fairchild "you know, the judge's salary and the number of children that I'm trying to educate and so forth, it was kind of hard and I do appreciate this opportunity." Trial Tr. 740 (Holmes). Despite Fairchild's desperate effort to find a smoking gun for the prosecutors, Jackson Tr. 193 (Fairchild), he never suggested that Judge Nixon made this unlikely comment, which is heavy proof that Holmes' testimony on the subject of the phone call is incredible.

Perhaps more important, Fairchild never corroborated Holmes' claim that he told Wiley on the telephone that he would pass Drew's case to the files. Compare Trial Tr. at 485 (Fairchild) with 740 (Holmes).

In view of these sharp inconsistencies between the testimony of Fairchild and Holmes, it is difficult to fathom the District Court's holding that Fairchild and Holmes "testified consistently . . . regarding what [Judge Nixon] and Holmes each said to Fairchild during that telephone call," and that "Fairchild and Holmes did not contradict each other with respect to the disputed conversations." Slip. op at 20. The District Court did not adequately master the trial record to recognize the gross error in that holding.

e. How Did Judge Nixon Get To Holmes' Farm?

The District Court noted that Holmes and Judge Nixon disagreed on how they got to Holmes' farm that night. Holmes claimed that Judge Nixon, with Carroll Ingram, met Holmes at Holmes' office in Hattiesburg and then travelled to the farm with Holmes, while Judge Nixon recalled that each independently went out to Holmes' farm and did not meet in Hattiesburg first. Slip op. at 19 (items (4)(b), (4)(c), (4)(d)). Compare Trial Tr. 1536-37 (Nixon) with Trial Tr. 736 (Holmes). According to Holmes, during the drive out to the farm Judge Nixon said that Fairchild had asked him to put in a good word for Drew.

But the District Court never acknowledged that Ingram's testimony squarely supports Judge Nixon's testimony that he did not go to Holmes' office at all, and certainly not with Carroll Ingram. Ingram said he was never at Holmes' office with Judge Nixon. Trial Tr. 1152, 1180 (Ingram); compare Trial Tr. 1545 (Judge Nixon) (never at Holmes' office with Ingram). If Holmes and Judge Nixon did not ride out to Holmes' farm together, then they never had any conversation in which Judge Nixon referred to "putting in a good word" for Drew Fairchild. Holmes' knowing lie on this point was completely missed by the District Court.

2. The Inability To Impeach Wiley Fairchild Effectively Was A Fatal Blow To Judge Nixon's Defense

When the trial record is stated accurately, the materiality of the suppressed evidence in this case is clear. Wiley Fairchild, a key witness, lied at Judge Nixon's trial to curry favor with the prosecutors. His false testimony was based on a variety of scripts that were dictated by the prosecutors, and also was induced by his hopes for leniency for him and his son, which the prosecutors promised in a variety of ways. The prosecutors suppressed the facts concerning those promises, the scripts, and Fairchild's inconsistent prior statements. The prosecutors thereby denied Judge Nixon the ability to reveal Wiley Fairchild's false testimony. The materiality issue turns on whether that suppressed evidence could have influenced the jury verdict.

It is critical to note that Wiley Fairchild broke down on cross-examination, abandoning the false script for a while and admitting that the phone call occurred after Drew's case was passed to the files in December 1982. Trial Tr. at 630-36, 654-56. Had Judge Nixon's counsel been fairly armed with all of the information about the prosecutors' deals, promises and scripts, Wiley Fairchild's temporary recantation at trial almost certainly would have been permanent, and he would not have reverted back to the prosecutors' script on the date of the phone call. And that recantation would have demolished the charges against Judge Nixon.

The only other material witness against Judge Nixon was Bud Holmes, and his weaknesses as a witness are undeniable. Both prosecutor and defense counsel agreed that Bud Holmes had very little credibility. Petitioner's counsel challenged his credibility in unmistakable terms. Trial Tr. 1931-32, 1954-55, 1956-60. Strikingly, the prosecutor never really defended Holmes as a witness, perhaps in part because he had indicted Holmes for perjury for each of the first three occasions on which Holmes testified before the Hattiesburg grand jury. Holmes' guilty plea to contempt charges concerned primarily false statements under oath before the grand jury.

The best the prosecutor could say on behalf of Holmes was to question whether Holmes was "the dog, the animal that [defense counsel] Fawer makes him out to be." Trial Tr. 1966-67. Indeed, when the prosecutor asked the sixty-four-dollar question about Holmes' veracity, he punted rather than answer (Trial Tr. at 1979):

> Is Bud Holmes telling the truth? Complicated question; complicated guy.

As we have explained at length before, Holmes' credibility is subject to serious question. See Post-Hearing Memorandum Opposing House Resolution 407, pp. 38-56 (July 26, 1988).

In addition, the government's factual presentation did not go unopposed. The defense brought in several witnesses who testified to Bud Holmes' manipulation of the Drew Fairchild case (Trial Tr. 1327-77 (Matison); Trial Tr. 1297-1309 (Judge Weldy); Trial Tr. 1310-27 (Judge McKenzie)) and to the proper value of the mineral interests sold to Nixon. Trial Tr. 1378-1407 (Massey)). Nixon himself took the stand and provided a complete accounting of his actions and statements. Since the trial, much of Judge Nixon's trial testimony has been reinforced by Wiley Fairchild as Fairchild has abandoned the false testimony he learned for the trial.

Moreover, the jury did not reach its verdict early or quickly. The jury deliberations extended for approximately eighteen hours and produced numerous pleas to the presiding judge for assistance, including one report of deadlock. Jackson Ex. 10. The ultimate decision was split, with the jury acquitting on Counts I and II and convicting on Counts III and IV.

The central truth on the materiality question, thus, is simple. Wiley Fairchild's false trial testimony was essential to the prosecution to buttress Bud Holmes and to attack Judge Nixon's credibility. The prosecutors used Fairchild for those purposes over and over in closing argument. See pp. 6-9, supra. But the prosecution had concealed powerful evidence that would have totally impeached Wiley Fairchild, and would have revealed his testimony as including key falsehoods that he had learned from the prosecutors. Denied that impeachment evidence, Judge Nixon was denied a fair trial.

C. Presentation Of False Testimony

A final claim which the District Court erroneously rejected is the contention that Judge Nixon's conviction cannot stand because it was based on false evidence. Basic principles of due process require that no man be convicted based on false testimony. A conviction must be vacated if, without the false testimony, the jury might have acquitted the defendant. United States v. Smith, 433 F.2d 149, 150-51 (5th Cir. 1970); Reno v. United States, 340 F.2d 307, 308-09 (5th Cir. 1965); Newman v. United States, 238 F.2d 861, 862 n.1 (5th Cir. 1956).

At Judge Nixon's trial, the following testimony was false:

1. Wiley Fairchild's description of his plea agreement omitted:

   (a) The prosecutors' promise to help Drew;

   (b) The pardon promise;

(c) The promise to drop the gratuity charge against Wiley Fairchild in certain circumstances.

2. Drew Fairchild falsely testified that the federal government made no promises in return for his guilty plea, when in fact the prosecutor had promised to make no sentencing recommendation.

3. Wiley Fairchild testified falsely that:

(a) the approach by Carroll Ingram concerning Judge Nixon's investment occurred after the drug seizure at the Hattiesburg Airport in August 1980, when it really occurred in late 1979.

(b) the phone call from Bud Holmes' farm occurred before Drew Fairchild's case was passed to the files, when the call really occurred after that event.

On the first two areas of false testimony -- concerning the prosecutors' deals with Wiley and Drew Fairchild -- the District Court held that the promises simply did not exist. This holding is totally unsupported in the record. *See* pp. 14-20, *supra*. Moreover, the prosecution certainly was aware of all of the promises that were omitted from the testimony of Wiley and Drew Fairchild, thereby making their omission a "deliberate deception" that does not meet the "rudimentary demands of justice." *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). *See United States v. San Filippo*, 564 F.2d 176 (5th Cir. 1977); *Blankenship v. Estelle*, 545 F.2d 510 (1977), *cert. denied*, 444 U.S. 856 (1979).

With respect to Wiley Fairchild's false testimony concerning the dates of the Ingram approach and the Holmes phone call, the District Court ruled (i) that the date of the Ingram approach was not material, and that the government did not know his testimony was false; and (ii) that Fairchild's recantation of the date of the phone call was not credible. Slip op. at 35-36. Once again, the District Court simply wished away all of the uncomfortable facts. [5]

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[5] Although a trial judge's credibility determinations are often given special deference when a witness has recanted, that deference is paid because the trial judge observed the witness's original trial testimony, and is especially well-situated to evaluate the recantation. *United States v. Adi*, 759 F.2d 404, 409 (5th Cir. 1985). This District Court did *not* hear Wiley Fairchild's trial testimony, and thus had no special ability to gauge the credibility of his recantation.

CONCLUSION

Because of the many factual and legal errors in the District Court opinion, this Subcommittee can not rely upon it as a guide in its deliberations. The Subcommittee must, however, recognize the fundamental shift in the case caused by Wiley Fairchild's recantation. Any charges against Judge Nixon must turn on the largely uncorroborated -- and often contradicted -- testimony of Bud Holmes. The awesome constitutional impeachment power cannot turn on so doubtful a hinge.

Respectfully submitted,

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